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HARVARD LA

U.S. SUPREME COURT

REPORTS

OF

C A S E S

ARGUED AND ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES.

IN

FEBRUARY TERM, 1814.

VOL. VIII.

BY WILLIAM CRANCH,

Chief Judge of the Circuit Court of the District of Columbia.

POTIUS IGNORATIO JURIS LITIGIOSA EST, QUAM SCIENTIA.
CIC DE LEGIBUS DIAL. I.

WASHINGTON CITY:

PRINTED BY DANIEL RAPINE.

1816.

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DISTRICT OF COLUMBIA, TO WIT:

(L. S.) BE IT REMEMBERED, That on the fifth day of November, in the forty-first year of the Independence of the United States of America, William Cranch, of the said district, hath deposited in this office, the title of a book, the right whereof he claims as author, in the words following, to wit:

"Reports of Cases argued and adjudged in the Supreme Court of the United States, in "February term, 1814 Vol. VIII. By WILLIAM CRANCH, Chief Judge of the Circuit "Court of the district of Columbia. Potius ignoratio juris litigiosa est, quam scientia.

"Cic. de legibus, dial. i."

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G. DENEALE,
Clerk of the District of Columbia.

REPRINTED IN TAIWAN

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE

REPORTS.

Honorable JOHN MARSHALL, *Chief Justice.*

Honorable BUSHROD WASHINGTON,
Honorable WILLIAM JOHNSON,
Honorable BROCKHOLST LIVINGSTON,
Honorable THOMAS TODD,
Honorable GABRIEL DUVALL,
Honorable JOSEPH STORY,
} *Associate Justices.*

RICHARD RUSH, Esquire, *Attorney General.**

* The commissions of the honorable G. DUVALL and the honorable J. STORY bear date November 18th, 1811.

R. RUSH, Esq. was commissioned as Attorney General February 10th, 1814, in place of William Pinkney, Esq. resigned.

ERRATA.

Page	45	line	36, for "insomuch," read *in as much.*
	69		11, for "devise," read *desire.*
	70		32, erase "Circuit."
	94		36, for "Hymas," read *Hyannis.*
	106		26, for "statute," read *state.*
	152		23, for "unnecessarily," read *necessarily.*
	152		27, for "can he," read *he can.*
	152		28, for "British," read *hostile.*
	187		21, erase "not."
	242		33, for "25, Edw 3, ch. 6," read 25, *Edw. 3, st. 5, ch.*
	243		14, for "tend," read *intend.*
	244		15, for "amount," read *current.*
	245		19, for "revival," read *revisal.*
	245		39, for "24." read 29.
	246		9, for "living," read *livery.*
	246		35, after "being" insert *universally.*
	247		13, after "us" insert *now.*
	249		3, for "unnecessary," read *necessary.*
	249		21, for "land," read *lord.*
	249		30, for "it," read *and,*
	249		35, for "parties," read *party.*
	250		35, before "seizin," insert *the.*
	250		37, for "to," read *of.*
	266		36, for "is," read *are.*
	281	last line,	for "belonging," read *belonged.*
	299	line	2, for "decision," read *decisions.*
	313		5, for "a," read *as.*
	372		27, erase "and."
	409		37, for "Robert," read *Roberts.*
	404		15, erase "to"
	409		37, for "and," read *et.*
	411		6, after "been" insert *an.*
	412		22, after Juris" erase the semi-colon.
	430		16, for "were," read *was.*
	430		40, after "relinquishing" insert *to the captors*
	441		36, after "delivering" arase "it."
	448		25, for "and," read *or.*

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SUPREME COURT U. STATES.

GRIFFITH *v.* FRAZIER.

1814.

Feb. Term

Present.....All the Judges.

Feb. 9th

ERROR to the Circuit Court, for the South Carolina district.

So long as a qualified executor is capable of exercising the authority with which he has been invested by the testator, that authority cannot be conferred, either with or without limitation by the Court of ordinary, on any other person. And if, during such capability of the executor, the ordinary grant administration, either absolute or temporary to another person, that grant is absolutely void. If a judgment be rendered against one as executor who is not executor, it does not bind the estate of the testator, and an execution upon such a judgment could not legally be

This was an action of trespass *quare clausum fregit*, brought by the Plaintiff in the Circuit Court (who was also Plaintiff in error,) to recover a tract of land lying in the district of South Carolina, and in the possession of the Defendant, to which the Plaintiff asserted a title derived from a certain Joseph Salvadore.

Both parties admitted that Salvadore was legally seized of an estate, in fee, in the land in dispute. It appeared further, that Salvadore had executed several bonds in favor of a certain Daniel Bordeaux; that Bordeaux brought an action against Salvadore on these bonds, and obtained thereon a judgment by default, which was entered up and signed on the 30th of August, 1786; that no further steps were taken in the cause, until the 2d of January, 1787, when an execution issued thereon, and was lodged in the sheriff's office on the same day; that Salvadore departed this life on the 29th of December, immediately preceding. Salvadore left a will and two or three codicils, by which he appointed his three daughters, a certain William Stevens, and a certain Joseph Dacosta, his executors. All these persons were absent, out of the state, excepting Dacosta, who proved the will and codicils, and regularly qualified as executor thereto, on the 5th of January, 1787: he continued to reside in the city of Charleston, South Carolina, until some time in the year 1789, when he went to Savannah, in the state of Georgia, where he continued to re-

GRIFFITH v. FRAZIER.

levied upon such estate.

By the law of South Carolina, administration durante absentia testatoris, cannot be granted after probat of the will and letters testamentary granted.

The acts of a tribunal, upon a subject not within its jurisdiction, are void.

By the law of South Carolina, the 30 day rule is substituted for a scire facias to a judgment in those cases only where lapse of time prevents the Plaintiff from suing out execution.

side until November, 1790. On the second day of October, 1790, one James Lamotte requested and obtained from the ordinary of Charleston, a citation, in behalf of the principal creditor of Salvadore, who was Bourdeaux, to shew cause why letters of administration with the will annexed, should not be granted to him. On the return of the citation, no cause being shewn to the contrary, the ordinary did, on the 8th of October, 1790, grant general letters of administration with the will annexed, on the estate of Salvadore, to Lamotte. A certificate was also obtained from the ordinary, by which it appeared that it was the custom of the ordinary Court to grant letters of administration *durante absentia* of the executor. Bourdeaux, on the 27th January, 1791, obtained a rule from the Court of common pleas, against Lamotte, as administrator of Salvadore, to shew cause within thirty days, why the judgment obtained against Salvadore, as aforesaid, should not be revived, and an execution issue thereon. This rule was made absolute on the 15th of March, 1791, "subject to future argument." On the 16th of April following (no further argument or proceeding having been had on the said rule, and no Court intervening in the mean time,) an execution issued, on said judgment, against Lamotte, administrator, &c. was lodged in the sheriff's office, and levied upon the land in question, by the Sheriff, on the 11th of May, 1791. The land was sold at public outcry to the highest bidder, on the 6th of June, 1791, and by a deed of the same date, was conveyed by the Sheriff to Peter Freneau, the purchaser. On the 16th of July, 1796, a decree was rendered in the suit, *Pierce Butler v. Daniel Bourdeaux and Peter Freneau*, directing the said Peter to convey to such person as Pierce Butler should appoint. In pursuance of this decree, Peter Freneau conveyed to Samuel Jackson, under whom Griffith, the Plaintiff in this case, claims by regular conveyances. Frazier, the Defendant, represents the heirs of Salvadore.

On the motion of the Defendant, the Circuit Court instructed the jury, that the letters of administration granted to James Lamotte, were totally void; that therefore the judgment of Bourdeaux was not revived against the estate of Salvadore; that the sale and conveyance by the sheriff passed no title to the purchaser; and that

the evidence was not sufficient to maintain the Plaintiff's action. The jury found a verdict for the Defendant, and judgment was rendered in his favor. The Plaintiff excepted to the opinion of the Court, and sued out a writ of error to the judgment.

GRIFFITH v. FRAZIER.

HARPER, *for the Plaintiff in error*, after stating the facts of the case, contended,

1st. That the letters of administration, being *durante absentia* of the executor, were lawfully and properly granted by the ordinary to James Lamotte.

2d. That the question whether the granting of these letters were legal or not, was a question proper for the decision of the Court of ordinary; and that the judgment of that tribunal was conclusive until reversed on appeal to the state Court having competent jurisdiction: that, consequently, the sale, in the present case, was valid, and the Plaintiff's title good.

JONES, *contra*.

1. The grant of administration *durante absentia* was absolutely void: which being the case, it is clear that the subsequent sale of the property in question by the sheriff was illegal and invalid.

Dacosta, the executor, had duly qualified; and the circumstance of his having absented himself from the state of South Carolina, for the space of twelve months is a matter of no importance, unless at the same time he was incapable of performing his duty as executor. But this does not appear to have been the fact. The ordinary therefore had no right to grant letters of administration to Lamotte.

As to the certificate, said to have been given by the ordinary, stating that it was the custom of the ordinary Court to grant administration *durante absentia* of an executor, it would be shown, on the part of the Defendant, that in every case which could be produced in support of that custom, the executor had *not* qualified.

The jurisdiction of the ordinary relative to the ap-

GRIFFITH v. FRAZIER.

pointment of an administrator, is determined by the act of the testator in appointing an executor. The administrator derives all his rights from the Court of ordinary, and nothing from the will. 1, *Com. Dig.* 340. 1, *Salk.* 302. *Toler ex'r.* 76, 98. 2, *Bac. Abr.* 381, 386, 401. 2, *Plowd.* 271.

The grant of letters of administration has, in some cases, been decided to be void, even after the refusal of the executor to take upon himself the execution of the will. 2, *Bac. Abr.* 386—*Went.* 145.

The ordinary in granting administration, is a ministerial, not a judicial officer. *Toler*, 50, 66. *Jac. Law, Dict. tit. executor.* 12, *Mod.* 437.

In the case under consideration, the executor had proved the will; and it did not appear to the ordinary that there were any goods and chattels unadministered. If this were the fact, the ordinary had no jurisdiction in the case. 2, *Bac. Abr.* 385. *Griffith's collection of South Carolina laws, p.* 35, 492. *Ober's administrator v.* ——, *M. S. report of a case decided in South Carolina.*

By the statute of 38, Geo. 3, c. 87, to remedy the defect of the law in not giving to the ordinary the power of appointing an administrator *durante absentia* of an executor who had proved the will, it was evident that, previous to that statute, the ordinary possessed no such power. That statute was so explained in the case of *Taynton v. Hannay*, 3, *Bos. and Pul.* 26. *Toler*, 104.

When the executor had taken upon himself the trust of executing the will, the goods were out of the jurisdiction of the ordinary. *Went.* 39. 4, *Burn's eccl. law.*

If the jurisdiction of the ordinary ceased upon the qualification of the executor, all his subsequent acts in relation to the business were void—3, *F. R.* 130. *Toller* 128. The Supreme Court of the United States has decided this principle in cases analogous to the present. 4, *Cranch*, 241, *Rose v. Himely.* 3, *Cranch*, 331, *Wise v. Withers.* Where a Court has no jurisdiction in regard to a particular subject, trespass will lie against a sheriff for executing its orders relative thereto.

2. Admitting the administration granted to Lamotte to have been rightful, yet the execution against him, under which the land in question was sold, was absolutely void; because the thirty day rule, under which the Plaintiff attempted to revive the judgment in this case, was admissible only where the judgment had expired by lapse of time merely; but was not competent to revive a suit or a judgment against the representative of a dead party, which could only be done by *scire facias*, and no *scire facias* having issued in this case to make Lamotte a party, the execution against him was absolutely void for want of a *judgment* whereon to ground it—*Griffith's collection of S. Carolina laws, 466, 7, sec. 7.*

PINKNEY, *Attorney General*, same side.

The principal if not the only point in controversy is, whether the Court of ordinary had jurisdiction in the case now under consideration.

The ordinary in receiving probate of a will, acts *ministerially;* and when the will is proved, he is *functus officio.* The authority of the executor is derived from the will. The only power of the ordinary is to ascertain the existence of the will.

If administration be granted upon the supposition that no will exists, and a will afterwards appear, all the proceedings under the administration are void—the administration is a mere nullity—*Toler,* 120, 121.

If there be a will, administration cannot be granted until the executor has refused or neglected to appear on summons—*Toler,* 93.

If administration be granted *durante absentia* of the executor, it becomes void upon the return of the executor and *probate* of the will. After probate the ordinary has no further jurisdiction.

The reason of the thing is obvious. The will vests the testator's property in the executor. He has a right after probate, to appoint an attorney. But according to the doctrine contended for by the Plaintiff, the ordinary

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may also appoint an attorney in the place of the executor. This would be a manifest inconsistency. The executor, after accepting the trust, is bound to administer, and is liable for the goods entrusted to him. See *MS. report of the case of Ford v. Travis, in the Court of appeals of South Carolina,* in which the Court decided unanimously that after probate of a will, the grant of administration is void although the executor is absent.

HARPER, *in reply.*

If this case is against the Plaintiff in error, it is a case of sheer law against justice. The Plaintiff in error is a fair, *bona fide* purchaser, without notice, under the sanction of the decrees of the Courts of the state where the land lies.

The principle contended for by the Defendant, is only true as to the general disposition of the estate. It does not apply to the temporary interference of the ordinary in particular cases, the peculiar circumstances of which render such interference necessary; such as cases of administration *durante minori ætate, ad colligenda bona, &c.*

In the case of *Ford v. Travis,* cited by the counsel on the opposite side, the ordinary had granted unlimited administration for all purposes and forever; but in the case now before the Court, the grant of administration is special and temporary, as appears by the recital in the letters themselves.

The grant of these letters was nothing more than the appointment of a curator. In England, the ordinary has a general power to issue letters of administration *durante absentia.* The statutes of Edw. 3 and H. 8, it is true, did not give a direct authority to grant administration in any case where there was an executor; but a practice grew out of the equity of those statutes, to grant temporary administration during the inability of the executor to act; as *pendente lite, minori ætate,* executor insane, &c. 2 *P. Williams,* 576, *Walker v. Wollaston.*

The *general* power of the ordinary to grant adminis-

tration ceases on the probate of a will in which an executor is named; but not his power over the estate for *special*, temporary purposes. The case in *P. Williams*, just cited, in which case probate had been granted, states the reasons for this temporary interference. The reason for granting administration *durante absentia* is the same as for granting it *durante minori ætate*. The *degree* of the necessity makes no difference: it is sufficient that there is a necessity. It is said that the executor may appoint an attorney. True; but suppose he does not—suppose that, without so doing, he abandons the estate, and leaves the country. Would not this be a case for the interference of the ordinary in the temporary appointment of an administrator? The only inference that can be drawn from the statute of Geo. 3, c. 87, which has been cited on the other side, is, that the power of the ordinary to grant administration in such cases was *doubted*; not that it did not exist: and so is the case in 3 *Bos. and Pul.* 26, to be understood. The statute of Geo. 3 is only declaratory of the common law; it does not enact a new law.

Such, then, is the doctrine in *England* on this subject. In South Carolina it is the same.

Until the year 1712, there is no trace of the existence of ordinaries in South Carolina. In that year an act was passed declaring the statutes of 13 Edw. 1, c. and 31, Ed. 3. c. 11, to be in force in that colony, and enacting that the powers mentioned in those acts as belonging to the ordinary in England, shall be exercised by the same kind of officer in South Carolina.

The act of 1744, directing the manner of returning inventories, speaks of ordinaries as then existing.

The act of 1789, directing the manner of granting probate and administration, gives that power to the county Courts in those counties where such Courts were established, and, in the other counties, leaves it to the *ordinaries*.

The statute of H. 8 is not in force in South Carolina. The common law is.

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The doctrine, therefore, relative to the subject under consideration is the same in South Carolina as in England; and the power of the ordinary is the same.

That it has been the practice of the ordinary Court to grant administration *durante absentia*, the Defendant does not deny, but urges that it has never, until the present case, been granted *after probate* by the executor. Perhaps not; but the reason is that no such case has before occurred. If it had, there is no doubt that the ordinary Court would have granted administration as it has now done. The Courts of the same description in England would have done the same. If they had not, the legislature would have interfered.

2. The judgment of the ordinary is conclusive that he acted judicially, and upon a subject properly cognizable by his Court. Therefore, even admitting that he erred in granting the letters of administration to Lamotte, yet Lamotte was administrator *de facto*, and his acts bound the estate of Salvadore, until those letters should be revoked.

That the subject was one properly cognizable by the ordinary, cannot be denied. He had jurisdiction, under the equity of the statutes already cited, to grant temporary administration. He had jurisdiction to ascertain whether or not there was a will of personal property; and no prohibition would lie to his proceedings. In a contest between two persons of the same name, both claiming to be executor, he might decide which of the two was entitled to administer the estate. He was competent to put such a construction upon the statutes as he might think correct, and to ascertain his powers growing out of the equity of those statutes. His judgment, therefore, in the present case, unless reversed on appeal to the Court of common pleas of South Carolina, was conclusive in every other Court where it might come incidentally in question. Yet this Court is now called upon not only to declare the judgment of the ordinary void, and to reverse the same, but to reverse, also, that of the appellate Court by which his judgment has been confirmed.

3. The judgment on which the execution in this case

issued, was properly revived by a Court of competent jurisdiction, and its judgment can be questioned only in an appellate Court.

The judgment was revived by a thirty day rule. That rule was, in fact, a *scire facias*. The proceeding was conformable to the usual practice in South Carolina. The Court of common pleas of that state adjudged the execution to be awarded upon this revival. Can this Court, under such circumstances, reverse that judgment? Suppose the judgment of the Court of common pleas had been founded on a *scire facias*, and that *scire facias* had been informal. Could this Court, in such a case, reverse the judgment? We contend that it could not in either case. The Court that ordered the execution to be awarded had jurisdiction so to do; and its decision is final.

The 9th section of the law of South Carolina, respecting the thirty day rule to revive judgments, &c. gives express authority to the Courts of that state to issue execution without a *scire facias*. But it is objected that this act is applicable only to cases of lapse of time, not to cases of the death of the party. But this is matter of construction on which those Courts were competent to decide.

The doctrine in the case of *Ford v Travis*, so much relied upon by the Defendant's counsel, is only that an unconditional, unlimited, administration, where the executor has previously obtained probate of the will, is void; not that a temporary administration would have been so in a like case.

4. Admitting the execution to have been improperly issued, still the sale of the property under that execution was valid.

All acts under a judgment obtained by fraud are valid: *a fortiori*, if the judgment be founded on a mistake either of law or fact. 3 *Cranch*, 306, *Simms and Wise v. Slacum*.

It is laid down in 2 *Bac. Abr.* 270, *Tit. Execution*, that "if upon his judgment the Plaintiff takes out a

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fieri facias, and thereupon the sheriff sells a term for years to a stranger, and the judgment is afterwards reversed, the Defendant shall only be restored to the money for which the term was sold, and not to the term itself; for by the writ the sheriff had authority to sell; and if the sale may be avoided afterwards, few would be willing to purchase under executions, which would render writs of execution of no effect." The following authorities go to establish the same point. *Roll. Ab.* 778. *Cro. Eliz.* 278. *Cro. Jac.* 246. 8 *Rep.* 96. *Matthew Manning's case. id.* 142. *Dr. Drury's case.* 1 *Wils.* 302, *Earl v. Brown.* It is true that these cases all relate to sales of personal property; but there is no difference as it respects the sale of lands under a *fieri facias*, or what was equivalent thereto, as in the present case. These lands were sold *as personal effects.* 1 *Haywood's N. Carolina Reports.*

PINKNEY, *contra*, contended,

1. That the case in 3 *Bos. and Pul.* did not state that the statute of Geo. 3 was founded on a *doubt*, but upon a clear defect of jurisdiction. That no case could be found to sanction the grant of administration *after probate* in a case like the present. That the case of *Ford v. Travis* was decisive that no such administration was valid in South Carolina.

2. That the judgment of the ordinary was not conclusive that he had no jurisdiction in a case like that under consideration. That the Court of appeals of South Carolina was of this opinion, and had therefore declared the judgment of the ordinary void. 2 *Bac. Abr.* 376.

3. That the judgment on the rule to show cause was not conclusive; and this, besides the other reasons which have been already mentioned, because it was against a person not a representative of the testator.

4. That this was not the case of a sale to a third person, as in the authority cited from Bacon, and the other cases to the same point; but that the Plaintiff claimed under Bourdeax, as a purchaser.

That the statute of South Carolina, respecting the thirty day rule, was only applicable to cases of lapse of time, not to cases of the death of the party

That as to the case in 1 *Wils.* 302, cited by the Plaintiff's counsel, it did not appear that the Court decided on the validity of the sale, nor that any person wished to disturb it.

JONES, *on the same side.*

As to the law respecting a *void* judgment, cited *Vin. Ab. Tit. Error*—also *Com. Dig.* and *Bac. Ab.* same title.

*Tuesday, February 15th. Absent....*WASHINGTON, *J.*

MARSHALL, *C. J.* delivered the opinion of the Court as follows:

The Plaintiff in error, who was also Plaintiff in the Circuit Court, brought a writ of trespass *quare clausum fregit,* in order to try his title to certain lands, lying in the district of South Carolina, which were in possession of the Defendant.

The title of the Plaintiff, which constituted the sole question in the cause, appeared, on the trial, to be as follows:

Joseph Salvadore, being seized of the lands in which the trespass is alleged to have been committed, departed this life some time in the year 1786, having first made his last will in writing, in which he named several executors, one of whom, Joseph Dacosta, made probate of the will, and took upon himself the burthen of executing the same; after which, in the year 1789, he left the state of South Carolina, and resided in Georgia. In the year 1790, letters of administration on the goods of Salvadore, unadministered by Dacosta his qualified executor, were granted to James Lamotte.

In August, 1786, a judgment was obtained by Daniel Bourdeaux against Salvadore. In January, 1791, a thirty day rule, which, by an act of the state of South Carolina, was, in certain cases, substituted in the place

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of a *scire facias*, was issued to revive this judgment against Lamotte as administrator of Salvadore. This rule being served and returned, the following indorsement was made on it: "15th March, 1791, made absolute subject to a future argument."

"Fi. fa. 16th April, 1791."

An execution issued on this judgment, under which the land was sold, and was conveyed by the sheriff to Peter Freneau by a deed dated the 6th day of June, 1791. On the 16th of July, 1796, a decree was rendered in the suit, *Pierce Butler v. Daniel Bourdeaux and Peter Freneau*, directing the said Peter to convey to such person as Pierce Butler should appoint. In pursuance of this decree, Peter Freneau conveyed to Samuel Jackson, under whom the Plaintiff claims by regular conveyances.

On the motion of the Defendant, the Circuit Court instructed the jury that the letters of administration granted to James Lamotte were totally void; that therefore the judgment of Bourdeaux was not revived against the estate of Salvadore; that the sale and conveyance by the sheriff passed no title to the purchaser; and that the evidence was not sufficient to maintain the Plaintiff's action. The jury found a verdict for the Defendant, and judgment was rendered in his favor. The Plaintiff excepted to the opinion of the Court, and has sued out a writ of error to the judgment.

The sole defect alleged in the title of the Plaintiff being in that part of it which depends on the sale and conveyance of the sheriff to Peter Freneau, the validity of that sale is the principal if not the only question in the cause. In support of it the Plaintiff contends,

1st. That the letters of administration, being *durante absentia* of the executor, were properly granted to James Lamotte.

2d. If the ordinary erred in granting these letters, still Lamotte was administrator *de facto*; and his acts bound the estate of Salvadore until those letters should be revoked.

3d, That the judgment on which the execution issued was properly revived by a Court of competent jurisdiction, and its judgment can be questioned only in an appellate Court.

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The negative of these propositions is maintained by the Defendant in error.

That the appointment of an executor, and his acceptance of the office, constitute a complete legal owner of the personal estate of the deceased is admitted; but it is contended that these acts suspend without annihilating the power of the ordinary. So long as the executor is capable of exercising the authority with which he has been invested by the testator, it can be conferred on no other person; but when he becomes incapable, from any cause whatever, as by insanity or death, the power of appointing some person, who shall secure the estate from ruin, necessarily reverts to that tribunal which the law appoints for the general purpose of providing for the management of the property of dead persons. All cases of temporary administration, as during the minority of an executor, or during his absence previous to the probate of the will, are considered as exercises of the same power, though in a less degree, and as proving that the ordinary may, after the executor has qualified, if he shall absent himself so as, in the opinion of the ordinary, to disqualify him from performing his duty, appoint an administrator *de bonis non* with the will annexed, whose power shall continue until the return of the executor.

The Court does not concur in this reasoning. In the cases stated at bar, and in all cases where temporary administration has been granted, unless under a special act of the legislature, the executor was, for the time, absolutely incapable of performing his duty. There existed an actual legal disability to perform the functions of his office. Until probate of the will, and until letters testamentary are obtained, the executor cannot obtain any judgment; because it cannot appear that he is executor.

There is, therefore, an absolute necessity for appointing some person who, until probate, shall take care of

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the estate. But this is not the case with an executor who, after taking out letters testamentary, absents himself from the state. He is still capable of performing, and he is still bound to perform, all the duties of an executor. There exists no legal disability in the executor, and, consequently, there is no necessity for transferring to another those powers which the testator has conferred on a person selected by himself.

This power does not appear ever to have been exercised by the ordinary in England anterior to the statute of 38, George 3d; and in South Carolina, the ordinary possesses no power which was not possessed by the ordinary in England previous to that statute. The practice of the particular ordinary who acted in this case, would not be sufficient to constitute the law, had it even never received judicial reprobation; but the case of *Ford v. Travis* puts an end to any doubt on this point.

The second point is one of more doubt and greater intricacy. That the ordinary erred in granting letters of administration to Lamotte, is thought very apparent; but the effect of these letters is less obvious. By the Plaintiff it is contended, that they constituted Lamotte an administrator *de facto*, rendered his acts valid, so far as third persons are interested, and exempted them from question where they can be examined only incidentally. By the Defendant it is contended, that they were granted by a person having no jurisdiction in the case, and are therefore an absolute nullity; That Lamotte was not, *de facto*, the administrator of Salvadore, and that his acts, as administrator, stand on no better or higher ground than the acts of any other person who should assume that character.

The well known distinction between an erroneous act or judgment by a tribunal having cognizance of the subject matter, and the act or judgment of a tribunal having no cognizance of the subject, is not denied; but it is contended that the ordinary had jurisdiction in this case. The ordinary, in South Carolina, is the Court in which wills are proved; in which letters testamentary, and letters of administration are granted. He judges whether the applicant be entitled to administration or not, and rejects or admits the claim, according

to his opinion of the law. Whether his judgment be correct or not, still it is his judgment; and when exercised upon an application for administration, it is exercised on a subject cognizable in his Court.

That he grants letters of administration in cases not expressly authorized by statute, and in which a will exists in which an executor is named, proves that he has jurisdiction in such cases; and if he grants administration in one of them improperly, the judgment is erroneous and voidable, but not void.

This argument has been very strongly urged, and there is great force in it. The difficulty of distinguishing those cases of administration in which a Court having general testamentary jurisdiction, may be said to have acted on a subject not within its cognizance, is perceived and felt. But the difficulty of marking the precise line of distinction does not prove that no such line exists.

To give the ordinary jurisdiction, a case, in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority; because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always enquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint, with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction.

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The case of letters of administration granted on the estate of a person in full life, is not the only one which may serve for illustration; suppose administration to be granted on the estate of a deceased person whose executor is present, in the constant performance of his executorial duties. Is such an appointment void, or is it only voidable?

In the opinion of the Court it would be an absolute nullity.

The appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels as was the testator himself while alive. This is incompatible with any power in the ordinary to transfer these chattels to any other person by the grant of administration on them. His grant can pass nothing: it conveys no right; and is a void act.

If the ordinary possesses no power to grant administration where an executor is present performing his duty, what difference can his absence make, provided that absence does not disqualify him from executing his trust? If all his powers as an executor remain, if he is still capable of appearing in Courts of ju tice as the representative of the deceased, if he is still the legal owner of the chattels of the deceased, and still capable of disposing of them, it would seem that he is potentially present though personally absent. It is not easy to perceive any principle on which the ordinary can assert his power to take the estate out of the executor and vest it in an administrator. If he cannot do this, then the attempt to do it must be a void act. If the administrator *durante absentia* be only the agent of the executor, it still occurs that the executor can himself appoint, and is the proper person to appoint, his own agent. There is no necessity for the intrusion of the ordinary.

Let the case be supposed of a suit by the executor while actually resident abroad. Would he be incapable of sustaining the action? Would his absence be a good

plea in bar? If it would not, how can the grant of letters of administration to another take the property in the thing sued for out of the executor and place it in that other?

Letters testamentary, when once granted, are not revocable by the ordinary. He cannot annul them, or transfer the legal interest of the executor to any other person. His rights and his duties are beyond the reach of the ordinary. How, then, can this be effected by the grant of letters of administration?

The cases in which administration has been granted notwithstanding the existence of a will, appear to be cases in which it is not apparent that there is any person possessing right in the chattels of the testator, or cases in which that person is legally disqualified from acting.

Where administration is granted pending a dispute respecting a will, it is not certain that there is an executor, or that there is a will.

If it be granted during the minority of an executor, it is because the executor is legally disqualified from acting, and indeed has not taken upon himself, and could not take upon himself the trust reposed in him. He may, when of age, reject all the rights and powers conferred by the will; and, consequently, the interest is not yet a vested interest. The rights and powers of the ordinary remain until those of the executor commence.

So in the case of an absent executor who has not yet made probat of the will and qualified. Those letters testamentary which are indispensable to his character as executor, and which, during their existence, leave the ordinary without any further power over the subject, are not yet granted. The executor has as yet no evidence that he is executor. He is not yet able to act as one. He may never be able to act; for he may never take out letters testamentary. He may renounce the executorship. The ordinary, then, is not yet deprived of that power which he possesses to appoint a person to represent a dead man who has no representative. His

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jurisdiction over the subject remains until he parts with it by issuing letters testamentary.

The difference between granting administration in cases where there is a qualified executor, capable, in law, of acting, and where he has not qualified, is such as, in reason, to justify the opinion that though, in the latter case, the ordinary may have jurisdiction, and his act, though erroneous, may be valid till repealed, yet, in the former case he can have no jurisdiction, and his act is in itself an absolute nullity.

If, under any circumstances, the ordinary could grant administration during the absence of an executor who has made probat of the will and is legally competent to act, then he would have jurisdiction of the subject, and would judge of those circumstances; but if, in no possible state of things, he could grant such administration, it would be difficult to conceive how he can have jurisdiction.

If we refer to authority, we can find no case and no *dictum* which admits the jurisdiction of the ordinary, where there is an existing executor capable of acting. In many cases it is stated, that an administration granted where there is such an executor is void. *Toller*, in his "*law of executors*, page 120, says, "If there be an "executor, and administration be granted before probate, "and refusal, it shall be void on the wills being afterwards proved, although the will were suppressed, or "its existence were unknown, or it were dubious who "was executor, or he was concealed, or abroad at the "time of granting the administration." It is also void "if granted because the executor has become a bankrupt," or if granted, "*durante minoritate* where the infant had "attained his age of seventeen," until the statute of 38, G. 3. So "if granted by a bishop where the intestate had "*bona notabilia*, or by an archbishop of effects in another province."

The case of *Ford v. Travis*, decided in South Carolina, is express to this point, and renders a further reference to English books unnecessary.

The counsel for the Plaintiff admits this to be the law

where an absolute administration is granted; but denies the law to be applicable to the grant of a temporary administration.

However correct this distinction may be in many cases, its application to that at bar is not admitted.

No temporary administration can be granted where there is an executor in being, capable of acting, and where the case will not justify the grant of a temporary administration, it would seem to be as completely out of the jurisdiction of the ordinary, as the grant of an absolute administration, where that is not within his power.

The case, put by *Toller*, of administration *durante minoritate* where the executor is of the age of 17, seems full in point. This is a temporary administration, and the minority of the executor is a fact for the consideration of the ordinary. Yet if, in such a case, he grants administration, the act is void, because, in fact, it is not a case in which he can grant it.

The reasoning of the Court in the case of *Ford v. Travis*, appears applicable to this case. They say the executor having proved the will, "was in the nature of a trustee; he could neither abandon his trust, nor be deprived of his interest in the estate of the deceased by any act of the ordinary. The ordinary, by proving the will and qualifying the executor, executed his power; and no law exists in this state, authorising him to resume it during the life time of the qualified executor, notwithstanding he may be absent from the state. Letters of administration granted under such circumstances are void *ab initio*.

If the ordinary cannot resume his power, so as to grant an absolute administration, he cannot resume it for a limited time. He cannot, by any act of his, divest the interest of the executor for an instant. The power may revert to him by operation of law, but cannot be assumed by any act of his own.

The grant of a temporary administration, as during the minority of an executor, is *ad usum et commodum*

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executoris. But in this case, the administration is, for the time, absolute, and makes the administrator the entire representative of the deceased. It would not be unworthy of remark, if the case depended on it, that though the application of Lamotte was for administration during the absence of the executor, yet the grant itself is without limitation.

But, in its very nature, the appointment of an administrator, during the absence of an executor under no disability, is essentially nothing more than the appointment of an agent for that executor. This, the ordinary has not the power to do. The executor alone can appoint his agents.

If the ordinary had no jurisdiction in the case, then the grant of administration was void *ab initio*, and all the acts of the grantee are void—*Toller*, 128, 3, *Term. Rep.* 125.

It is contended by the Plaintiff, that could this administration even be considered as null, where that forms the direct question before the Court, as it did in *Ford v. Travis*, yet that point cannot be examined where it is collateral and incidental.

The answer which has been given at bar to this argument is entirely satisfactory. The question has never been examined in a Court of law sitting as an appellate Court. The question has never been, whether the letters of administration shall be revoked or not, but whether they were originally void, so as not to warrant the particular act in support of which they were alleged.

But in this case, the letters of administration come as directly before the Court as in the case of *Ford v. Travis*. The conveyance from the sheriff to Freneau forms a part of the Plaintiffs title; and the validity of that conveyance may depend on the question whether Lamotte was or was not the administrator of Salvadore. The question, therefore, must necessarily be decided; and a majority of the Court is of opinion that administration was granted by a Court having no jurisdiction in the particular case, and is therefore absolutely void.

3d. It is contended on the part of the Plaintiff, that the judgment on which the execution issued was properly revived by a Court of competent jurisdiction, whose judgment is therefore conclusive until reversed.

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The first objection made to this judgment of revivor is, that it was made without legal process. The thirty day rule is substituted for the *sicre facias* only in cases where lapse of time prevents the Plaintiff from suing out execution.

However this Court might construe the law on an appeal from a judgment of revivor in such case, that question has been decided by a Court of competent jurisdiction, and cannot be reviewed here.

The second objection is, that the letters of administration being a mere nullity, no party representing the estate of Salvadore was before the Court, and consequently the judgment could not bind that estate.

This question is one of considerable difficulty. Had the judgment been revived against the executor himself, without the service of process, it would perhaps, while in force, have protected all proceedings under it. But this judgment is revived against Lamotte, who was not the representative of Salvadore. In the opinion of a majority of the Court, an execution on this judgment could not legally be levied on the property of Salvadore; and if so, the title was not vested in the sheriff by the service of the execution, and could not be conveyed by him to the purchaser. Upon this point, the case cited from *1st Wilson*, 302, is a strong one against the opinion of the Court: but in that case, the execution, though irregular, was issued on a real judgment, and justified the sheriff in taking the effects of the deceased. On its face it was unexceptionable. It issued at an improper time; but in all other respects was correct. In this case, the execution issued on a judgment which was itself a nullity; and it authorized the sheriff to take the effects real and personal of Joseph Salvadore in the hands of James Lamotte to be administered. Now the property of Salvadore was not in the hands of Lamotte, but was in the hands of his executor.

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The case in *Wilson*, too, is so briefly, I might say obscurely, reported, as to leave the principle, on which the Court decided, entirely uncertain. It does not appear that the object of the motion extended further than the restoration of the money. This was not an attempt to set aside the sale; and nothing appears in the case from which is to be conclusively inferred what the opinion of the Court would have been on that question.

In the opinion of a majority of the Court, there is no error in the judgment of the Circuit Court, and it is affirmed with costs.

Wednesday, February 16th.

HARPER observed that he understood the opinion of the Court to be founded considerably on the form of the *fieri facias*, inasmuch as it directed the sale of the lands of Salvadore *in the hands of Lamotte*, when, in fact, there were no lands *in the hands of Lamotte*.

MARSHALL, *Ch. J.*

That was *one* ground of the opinion: but another, was, that the sale was founded on a void judgment.

HARPER, as to the first point, suggested to the Court that the form of the *fieri facias* was against the *lands* as well as the goods.

VAN NESS *v.* FORREST.

1814.

Feb. 8th.

Absent....WASHINGTON, *J.*

A promissory note, given by one member of a commercial company, to another member, for

ERROR to the Circuit Court for the district of Columbia.

The case as stated by MARSHALL, *Ch. J.* in delivering the opinion of the Court was as follows:

The Defendant in error, who was president of a commercial company, consisting of four or five hundred members, sold certain merchandize, the property of the company, to Jehiel Crossfield, and took his note payable in twenty days to Joseph Forrest, president of the commercial company, for the purchase money. Default having been made in payment, Joseph Forrest instituted a suit against Jehiel Crossfield and John P. Van Ness, who was a dormant partner of Crossfield, and also a partner of the commercial company.

The declaration contains several counts. The first is on the promissory note, which is charged as the note of Crossfield and Van Ness, trading under the firm of Jehiel Crossfield. The second and third, for goods, wares and merchandize sold and delivered, the fourth for money had and received by the Defendants, to the use of the Plaintiff, and the fifth on an *insimul computassit.*

The Defendant, Van Ness, pleads the general issue, on which plea issue is joined.

He also pleads in bar several special pleas, amounting in substance to this, that the several assumpsits in the declaration mentioned, were made for goods, wares, and merchandize belonging to the commercial company, consisting of many partners, and of which both the Plaintiff and himself were members.

The third plea alleges, that the Plaintiff did agree to accept and did accept the separate promissory note of the said Crossfield, in payment of all and singular the debt and debts, promises and assumptions in the Plaintiffs said declaration above supposed; in pursuance and execution of which agreement aforesaid, the said Defendant, Jehiel Crossfield, made the said promissory note in the Plaintiffs said declaration mentioned and delivered the same to the said Plaintiff, on the day of the date of the said note, at the county aforesaid, and the Plaintiff then and there accepted the same as payment, in pursuance of the aforesaid agreement.

To these several special pleas, the Plaintiff in the

the use of the company, will maintain an action at law by the promisee in his own name, against the maker, notwithstanding both parties were partners in that company, and the money when recovered would belong to the company. If the declaration be upon a joint note, and the Defendant plead, that the note is the separate note of one of the Defendants, and was given to and accepted by the Plaintiff, in full satisfaction of the debt, this plea is bad upon special demurrer, because it amounts to the general issue.

VAN NESS v. FORREST.

Court below demurred specially, and the Defendant joined in demurrer.

On argument, the demurrers except to the third plea, were overruled, and the pleas sustained as to the 2d, 3d and 4th counts, but the demurrers were sustained as to the 1st and 5th counts of the declaration. The demurrer was also sustained as to the 3d plea, which was adjudged bad as to all the counts.

On the trial of the issues, Van Ness objected to the evidence offered by the Plaintiff below, to support the first count, and his objection being overruled, excepted to the opinion of the Court. This exception brings on the whole question made by the pleas on the point, that the goods for which the note was given, were partnership goods belonging to a company of which both the Plaintiff and Defendant were members.

The jury found a verdict for the Plaintiff below, on which judgment was rendered, and the cause is brought into this Court by writ of error.

JONES, *for the Plaintiff in error*, contended,

1st, That this action is not sustainable, it being brought by one partner against another. And 2d, That the separate note of Crossfield was a discharge of the original debt due from Crossfield and VanNess.

1. An action does not lie by one partner against another, unless for a balance stated and acknowledged upon settlement of the partnership accounts.

The suit was as much for the use of Van Ness, as of any other of the stockholders. The Plaintiff was only a conventional president. The stockholders must all join in the action, and then Van Ness would be both Plaintiff and Defendant.

2. The plea states, that the Plaintiff agreed to take the separate note of Crossfield in full satisfaction for the goods sold and delivered. This was decided by this Court to be a good defence in the case of *Sheehy v. Mandeville*. 6. *Cranch*, 253.

J. LAW, *contra.*

It is true that one partner cannot sue another on an *implied* promise, but he may upon an *express* promise. 2. *T. R.* 479, *Foster v. Allanson.* 1. *East.* 20, *Wright v. Hunter.* After verdict, the promise shall be taken to be express—4. *Cranch*, 224, *Grant v. Nailor.*

The Defendant cannot set up a trust to defeat the Plaintiffs legal right to recover. If the trustee of a feme sole should bring an action against the husband, he could not defend himself by pleading that the money if recovered, would be for the use of his wife, and that the wife could not sue him at law. The Defendant cannot be permitted to look behind the legal Plaintiff for the purpose of setting up an inequitable defence. If this doctrine were to prevail, private banking companies could not recover money lent to stockholders.

The causes of demurrer assigned are, that the plea amounts to the general issue—and that the plea neither admits nor denies the promise laid in the declaration.

JONES, *in reply.*

The cases cited do not take this case out of the general principle, that one partner cannot sue another.

This is not an express promise of the Defendant. It is only by implication that he is charged. It is a promise that the law raises upon the fact, that he is a partner with him who expressly promised. In all the money counts, the promise is implied.

As to the objection that the plea amounts to the general issue—that point is settled also in the case of *Sheehy v. Mandeville.*

MARSHALL, *Ch. J.* after stating the case delivered the opinion of the Court as follows:

It is contended by the Plaintiff in error,

1st. That this action is not sustainable, it being brought by one partner against another.

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2d. That the separate note of Crossfield discharges the original debt, due from Crossfield and Van Ness.

As the first error assigned by the Plaintiff, is, if it be really an error, apparent on the bill of exceptions, as well as in the pleas, it is not necessary to examine the formality of the pleas respecting it.

It is alleged that, at law, one partner can sue another, on a claim growing out of the partnership, in no other case than for a general balance on a stated account.

The terms in which this proposition has been laid down *are perhaps too general.*

In the case at bar, the suit is instituted on a promissory note given, not to the company, but to Joseph Forrest, president of the company. Although the original cause of action does not merge in this note, yet a suit is clearly sustainable on the note itself. Such suit can be brought only in the name of Joseph Forrest. It can no more be brought in the name of the company, than if it had been given to a person, not a member, for the benefit of the company. The legal title is in Joseph Forrest, who recovers the money, in his own name, as a trustee for the company. Upon the record, and technically speaking, he is the sole Plaintiff, and the Court can perceive no reasonable or legal objection to his sustaining an action on the note. The principle that a company cannot sue its members, does not apply to the case; nor does the principle, that a partner cannot sue a partner on a partnership transaction, apply to any case where a note in writing is given for money, not to a firm, but to an individual member.

The third plea alleges, that the Plaintiff in the Court below agreed to accept the separate promissory note of Crossfield in payment, and that, in execution of this agreement, Crossfield made the note in the declaration mentioned, which was accepted in payment of the several assumptions stated in the declaration.

Now the note, in the declaration mentioned, is a joint note, so that this plea in one place alleges it to be a joint note, and in another place to be a several note.

It becomes unnecessary to inquire into the effect of this repugnancy, if it be one, because the plea, if to be understood as averring that the note, in the declaration mentioned, is a several and not a joint note, would amount to the general issue. The plea is no more, to the first count, than *non assumpsit*. For if the note was not the note of Van Ness, he had not made the assumpsit stated in the first count. This is ill upon a special demurrer, when assigned as cause of demurrer.

The Plaintiff in error supposes the case of *Sheehy v. Mandeville & Jameson*, reported in *6th Cranch*, 253, to be a case in his favor, on this point. The Court thinks otherwise. In that case, as in this, a note was given by one partner for a debt contracted by the firm. In that case, as in this, one count in the declaration was special, on the note, stating it to be a joint note, and other counts were general, on the original transactions. The Defendant, whose name was not on the note, stated it to have been received in discharge of the open account. The Court decided, that the plea was good, not in bar of the special count on the note itself, but in bar of the general counts, for goods sold and delivered.

Upon the special count, the Court was in favor of the Plaintiff below, who was also Plaintiff in error, and the judgment of the Circuit Court, which had been against him, was reversed. The case of *Sheehy v. Mandeville & Jameson*, then, is not in favor of the Plaintiff in error, so far as his third plea applies to the first count in this declaration.

This Court is of opinion, that there is no error in the judgment of the Circuit Court either in sustaining the demurrers to the several pleas filed in that Court to the first count in the declaration, or in admitting the note, in the declaration mentioned, to be given in evidence to the jury, on the trial of the issue of fact. This opinion renders it unnecessary to examine the decision of the Circuit Court, as it respects the pleas to the other counts, since, should their decision respecting the pleas to those counts even be deemed erroneous, their judgment will stand.

Judgment affirmed with costs and damages, at the rate of 6 per cent. per annum, and costs.

1814. THE BANK OF ALEXANDRIA v. HERBERT.

Feb. 14th.

Absent....WASHINGTON, J.

The trustee of an insolvent debtor in the district of Columbia, represents the creditors of the insolvent, & can take advantage of a defect in a mortgage, of which the insolvent himself could not.

THIS was an appeal from the Circuit Court for the district of Columbia, sitting in chancery, at Alexandria.

A bill in chancery was brought by W. Herbert, junior, trustee for the creditors of John Potts, an insolvent debtor under the act of congress for the relief of insolvent debtors within the district of Columbia, against the bank of Alexandria, to recover the proceeds of a tract of land, the property of Potts, which had been sold by consent and the money deposited in the bank. This land had been conveyed by Potts to Ludwell Lee in trust to secure the payment of money borrowed of the bank by Potts, *but the deed of mortgage had not been recorded within the time limited by the law of Virginia*, which governs this case, and which declares that all deeds of mortgage whatsoever, although good between the parties, shall be void as to creditors and subsequent purchasers without notice, unless they be recorded within eight months after their date.

SWANN, *for the Appellants*,

Although the deed to Lee would be void as to a subsequent purchaser for valuable consideration without notice, yet it is not void as to Herbert, who is the trustee of Potts under the insolvent law for the district of Columbia—*(Laws U. S. vol. 6, p. 294.)* A trustee under that law is like an assignee under a commission of bankruptcy in England. He stands merely in the place of the insolvent. He takes the estate as the insolvent held it. He is bound by the same equity, and liable to the same obligations. *Cooper's B. L. 128. 307, 2 Vez. 633. 1 Atk. 94, 162. 2 Vern. 564, 609, Taylor v. Wheeler. 1 Br. C. C. 269. Russel v. Russel.* The deed to Lee being good against Potts, is equally valid against Herbert.

TAYLOR, *contra.*

No English authority can apply *directly* to this case. Potts remained in possession ten years after the deed to Lee, and until his insolvency and the execution of the deed to Herbert, when he delivered to Herbert the possession.

But the deed is void as to *creditors* as well as *purchasers*, and creditors are not affected by notice, although purchasers are. The fact that Herbert had notice does not appear; but if it did, he represents the *creditors*; and their *rights* are *his*. If there had been no deed to Herbert, the creditors might have obtained a decree in their own names to vacate the deed to Lee and compel a sale.

But if this cause depends upon the decisions under the bankrupt law, yet the assignee of a bankrupt represents the creditors, and can take advantage of defects which the bankrupt himself could not. *Cooper* 307. In the case of *Taylor v. Wheeler*, 2 *Vern.* 564, it does not appear that the creditors had a right to avail themselves of the defect in the mortgage. If Herbert represents the creditors, the fourth section of the statute of Virginia is conclusive. 1 *P. P. Rev. Co.* 157. If he does not represent the creditors, then all the provisions of the insolvent law are of no avail. If the deed cannot be set aside by a bill in the name of the trustee, the judgment creditors may file a bill in their own names and set it aside.

SWANN, *in reply.*

The assignee of a bankrupt also represents the creditors, but yet it has been decided (1 *Atk.* 94) that although creditors might vacate a deed, yet an assignee could not.

The case of *Taylor v. Wheeler* is very strong. The mortgage was void at law for want of a surrender of the copy-hold in due time, yet it was decreed that it should be made good against the assignee of the mortgagor, who, it was admitted, represented the creditors. But the chancellor said that the Complainant also was

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a creditor, and had trusted to this particular fund, but the others were general creditors; and upon that distinction his decree seems to be founded. The reason of that case is precisely applicable to the present. The bank lent the money upon the credit of this very security.

February 16th....MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

In this case a bill was brought in the Circuit Court for the county of Alexandria, by William Herbert, jr. trustee for the creditors of John Potts an insolvent debtor, against the bank of Alexandria, to recover the proceeds of a tract of land, the property of Potts, which had been sold by consent, and the money deposited in bank.

This land had been conveyed by Potts to the bank to secure the payment of a sum of money borrowed by him, but the deed of mortgage had not been recorded until eight months after its date had elapsed. The law of Virginia, which governs this case, declares all deeds of mortgage whatsoever, though good between the parties, to be void as to creditors and subsequent purchasers without notice, unless they be recorded within eight months from the date.

The question is whether this mortgage can be set up in favor of the bank against the trustee for the creditors.

The Circuit Court decreed in favor of the trustee, and from that decree there is an appeal to this Court.

For the Appellant it is contended that the trustee may be assimilated to the assignees of a bankrupt, and he has adduced some cases from the books showing that in England a deed declared to be void in law has been supported against the assignees in favor of the particular creditor who holds a lien upon it.

The resemblance between the trustee for the estate of an insolvent debtor in the district of Columbia and the assignees of a bankrupt is admitted; yet a clear distinction exists between the cases cited at bar and

that before the Court. In those cases the deed was declared void without any view to creditors. In this case the deed is declared void for the particular benefit of creditors. To set up this deed against the creditors would be to defeat the very object for which the law was made.

The counsel for the Appellant is well apprised of this distinction, and though he claims for his clients the benefit of this deed against the trustee, he admits that it could not be sustained against the creditors suing in their own names.

In reason there can be no difference between this suit, which asserts the right of the creditors in the mode prescribed by law, and an assertion of that right in their own names. Nor does the law distinguish between them. The cases cited did not turn on any distinction between the rights of the assignee and the creditors, but on the preference which ought to be given to him who has trusted on the credit of the particular fund over those who had trusted the general fund.

The decree is affirmed with costs.

MARCARDIER v. THE CHESAPEAKE INSURANCE COMPANY.

1814.

ERROR to the Circuit Court for the district of Maryland.

Where a technical total loss, is sought to be maintained upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, all deterioration of memorandum

The facts of this case were thus stated by STORY, *J.* in delivering the opinion of the Court.

This is an action on a policy of insurance, underwritten by the Defendants, on the 29th of October, 1806, for $ 31,000, upon any kind of lawful goods on board the brig Betsey, whereof Alexander M'Dougal was then

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master, on a voyage at and from New York to Nantes. M'Dougal was the general owner of the brig, and, on the 1st day of October, 1806, by a charter-party of affreightment made with the Plaintiff, granted, and to freight let, to the Plaintiff, the said brig, excepting and reserving her cabin for the use of the master and mate and for accommodation of passengers, as therein mentioned, and so much room in the hold as might be necessary for the mariners, and storage of water, wood, provisions, and cables, for the voyage from New York to Nantes; and M'Dougal, by the same instrument covenanted to man, victual, and navigate the brig at his own charge during the voyage, and to receive on board any shipment of goods, not contraband, which the Plaintiff should tender at the side of the ship, or within reach of her tackles, at New York, and to stow and secure the same, and proceed therewith to Nantes, and there discharge the same. The passengers on board the brig were to be at the joint expense of the parties, and the passage money was to be equally divided between them. The other clauses in the charter party are not material to be stated, except that the Plaintiff covenanted to pay the stipulated freight and demurrage. The cargo, put on board by the Plaintiff, was of the invoice value of $ 29,889, of which $ 7,439 were in memorandum articles. The brig sailed on the voyage, under the command of M'Dougal, on the 9th of November, 1806, and during the voyage was compelled by stress of weather, and other accidents, to bear away for the West Indies, and arrived at the port of St. Johns, in Antigua, on the 22d day of December. There the master made application to the vice admiralty for a survey, &c. and such proceedings were had upon his application, that the cargo was landed, and by a decretal order of the Court, of the 31st of January, 1807, the same was ordered to be sold for the benefit of all concerned, reserving the question as to freight. Under this decree, the cargo was accordingly sold, and the sales completed before the 28th of March, 1807; and the nett proceeds of the whole of the Plaintiff's property amounted to $ 13,767. The nett proceeds of the memorandum articles, included in the same sum, were $ 6,863 30. The whole proceeds were paid over to an agent appointed by M'Dougal, and the freight for the whole voyage was allowed him by the admiralty, upon a re-

articles must be excluded from the estimate. Therefore, in a cargo of a mixed character, no abandonment for mere deterioration in value during the voyage, can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo including the memorandum articles.

Where the general owner of a ship retains the possession, command & navigation of the same, and contracts to carry a cargo on freight for the voyage, the charter-party is to be considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. In such case, the general owner is also owner for the voyage. Con-

port of commissioners, to whom the question was referred. The brig was repaired at Antigua, within a reasonable time, at the expense of one sixth only of her value, and capable of performing the voyage with the original cargo; but M'Dougal voluntarily abandoned the voyage at Antigua, for his own emolument and advantage. Of the cargo, 99 bags of coffee were spoiled and thrown overboard, and the residue greatly damaged by the perils of the seas; and the whole cargo, including the memorandum articles, sustained a damage, during the voyage, exceeding a moiety of its original value. On the 4th of Feb. 1807, and within a reasonable time after receiving information of the loss, the Plaintiff abandoned the whole cargo to the underwriters.

sequently, if he be the master of the vessel, he is incapable of committing barratry.

The declaration contained two counts, for a total loss; 1st. by the perils of the seas, and 2d. by barratry of the master. At the trial, the Court below, upon the facts and circumstances above stated, held that the Plaintiff was not entitled to recover, as for a total loss of the cargo insured, including the memorandum articles; and the cause came up to this Court, upon a bill of exceptions to that opinion.

HARPER, *for the Plaintiff.*

The great controversy between the parties in this case, turns on the question, whether the loss of the cargo now under consideration, was partial or total. It is contended, on the part of the Plaintiff, that it was a total loss.

1st. By the dangers of the seas.

2d. By the barratry of the master.

By the dangers of the seas—

1st. Because the voyage was broken up and lost by the deterioration of the cargo, to more than half of its value.

2d. Because there may be a total loss of memorandum articles, by the loss of the voyage; although the articles themselves remain in existence, and of some value.

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By the barratry of the master—

1st. Because the acts imputed to him, amount to barratry, if he were in a situation to commit it.

2d. Because by the charter-party, the Plaintiff became owner *pro hac vice*, and M'Dougal merely master, so as to be in a situation to commit barratry.

The question to be first considered, may be stated as follows:

Whether, in case a cargo consists partly of memorandum articles, (on which no partial loss can be recovered,) a total loss is incurred by the breaking up of the voyage on account of such a deterioration of the whole cargo, (including a deterioration of the memorandum articles,) as reduces the value of the whole cargo more than one half.

We hold the affirmative of the question.

But there are two cases which have been considered as very strong in favor of the negative. These are,

1st. The case of *Wilson & another* v. *Smith*, 3. *Burr.* 1550. cited also in *Marsh.* (1*st Am. ed.*) 141. This was of a ship with a cargo of corn, which, having met with a storm, was obliged to run for the nearest port to refit, where she incurred a considerable expense in repairs. On her arrival at her port of destination, it was found that the corn was damaged to more than half its value. Lord *Mansfield* decided, that this loss, not being of the nature of a general average, nor arising from the the ship's being stranded, could not be recovered on the policy; for that the words of the memorandum, "*free from average, unless general, or the ship be stranded,*" did not make a condition, but only an exception.

The answer to this case is, that the vessel had arrived at the place of destination; the voyage therefore was not broken up, and so no total loss could be claimed on the ground, that the cargo was deteriorated more than half its value.

2d. The other case, and that which is chiefly relied upon by the Defendants, is the case of *Cocking v. Fraser—Marsh.* (1st Am. ed.) 144.

Here the voyage was broken up; and it was decided by lord *Mansfield*, and the other justices who sat in the cause, one of whom was Mr. Justice *Buller*, that if the articles for which the insurer is warranted to be free from average, except general, *specifically remain* after the voyage, though by sea damage they are rendered of no value, yet, if the ship has not been stranded, this is only a *partial loss*, for which the insurer is not liable.

The authority of this case, it must be confessed, would go far to prevent the present Plaintiff from recovering as for a total loss, were it not for the observations made upon it by lord *Kenyon*, in the case of *Burnett v. Kensington*, 7. *T. R.* 210.—Also *Marsh.* (1st. Am. ed.) 151. The opinion of the Court in that case tends very much to invalidate its authority.

The principle of *Cocking v. Fraser*, is also overruled in the case of *M'Andrews v. Vaughan*, *Marsh.* (1st. Am. ed.) 150—and *Park*, 114, which goes to show that, where a cargo consists of memorandum articles, *if the voyage be lost*, the insured may recover as for a total loss, though the cargo be not wholly destroyed. And there is, in fact, the same reason that the breaking up of a voyage, in case of memorandum articles, should constitute a total loss, as where the cargo consists of articles not mentioned in the memorandum. The general doctrine now is, with regard to both descriptions of goods, that there may be a total loss by the breaking up of the voyage.

Dyson v. Rowcroft, 3. *Bos. & Pul.* 474, is another case against the principle laid down in *Cocking v. Fraser*. The opinion of the Court here, was, that it is a total loss of memorandum articles, although they may remain *in specie*, if they become so much damaged as to be no longer worth carrying to the port of destination.

The next question is, whether there was a total loss

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by the barratry of the master; and this must be decided by ascertaining who was the owner of the vessel for the voyage; for it is agreed on all hands, that if the master was in a situation to commit barratry, he was actually guilty of that offence.

A person may be owner for the voyage, who is not the general owner of the ship; and barratry may be committed against such person by the master, although the barratrous act of the master may have been done with the consent of the actual general owner. *Cowp.* 143, *Vallejo v. Wheeler.* See the same case also in *Marsh.* (1st. Am. ed.) 454.

In the case now before the Court, Marcardier, the Plaintiff, was owner of the vessel *pro hac vice*, although M'Dougal, the master, was the general owner. We contend therefore, that, according to the principles laid down in the case last cited, the master was in a situation to commit barratry against the Plaintiff—that he has actually done so—and therefore that the Plaintiff is intitled to recover as for a total loss.

PINKNEY, *contra.*

It has been contended for the Plaintiff, that there may be a total loss by the breaking up of a voyage, if the goods on board be deteriorated more than half. No English authority, to this effect, is recollected. The Courts in New York have so decided, it is true; but the principle may be considered as arbitrary, and the decision as local.

According to MARSHALL, (Eng. ed.) *vol 2, p. 486*, if the goods insured specifically remain, and are actually landed at the port of delivery, however damaged in the voyage, the injury will amount but to a partial loss. Why, then, should the insured have a right to abandon as for a total loss at an intermediate port, if the goods *can* be carried, in the same or another ship, to the place of destination? All the authorities in favor of the right to abandon at an intermediate port, are cases where the voyage was broken up by the incapacity of the ship to perform it. But in the present case, there was no such incapacity. The vessel

was repaired at Antigua within a reasonable time, at the expense of one sixth of her value, and was capable of performing the voyage, with a considerable part (at least one third) of the original cargo. The case therefore, is materially different from those cited on the part of the Plaintiff. *Vid. Park's* observations in the cases of *Cocking v. Fraser, & Dyson v. Rowcroft*, 1. *Park.* (6th Lon. ed.) 152. Also 2. *Marsh.* (Eng. ed.) 586, *Manning v. Newnham.*

It is the opinion of the best judges in cases of this nature, that the law of abandonment has already been carried far enough; but the counsel for the Plaintiff would carry it to an extent hitherto unprecedented.

With regard to memorandum articles, all the authorities go to show that there must be an *actual* total loss, in order to justify an abandonment. A *technical* total loss, is not sufficient. The underwriters are not liable for mere deterioration, however great, of such articles: They refuse to have any thing to do with it, on account of the difficulty of knowing the real cause of such deterioration. 1. *Marsh.* (Eng. ed.) 227, note to the case of *Cocking v. Fraser.* As to memorandum articles, also, the intermediate port makes no difference.

In the case of *Dyson v. Rowcroft*, 3. *Bos. & Pul.* 474, there was an *actual* total loss. The Court, in that case, do not mean to say that memorandum articles may be subject to a *technical* total loss.

The alleged barratry is next to be considered. The question arising on this point is, as has been already stated, whether the master, under the circumstances of the case, could commit barratry. If he could, the facts seem to show that he was guilty of the offence. But we contend that the master was, in fact, the owner of the vessel for the voyage, as well as general owner, and therefore, since barratry is a fraud against the owner, he could not be guilty of that offence, insomuch as a man cannot commit a fraud against himself. The charter-party, in this case, is of a peculiar construction; it sounds in *covenant* throughout; it is clearly not an assignment of the property to the Plaintiff, *pro hac vice*:

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The master finds the crew, pays them, provides for them, and has the whole management of the vessel: He must, therefore, be considered as owner for the voyage. In *Vallejo v. Wheeler*, the charter-party is not set forth, but it is stated in the case that the freighter employed the master and crew, and paid the crew. The Court said it would be different if it were not a general freighting. Here the Plaintiff was not a general frieghter. *Loft*, who also reports the case of *Vallejo v. Wheeler*, (*Loft*, 641) says, that where the master employs and pays the crew, &c. the charter-party seems to be rather a covenant, and does not make the frieghter owner for the voyage. 1. *Johnson*, 229, *M'Intire v. Bowne*. 8. *Johnson* 272, *Hallet v. The Columbian Insurance Company*. 1. *Cranch*, 214, *Hooe & Co. v. Groverman*.

HARPER, *in reply*.

The question as to barratry is, who had the beneficial interest in the vessel during the voyage There can be no doubt that the beneficial interest was in the Plaintiff. It is of no importance, as it regards the ownership of the vessel, by whom the crew was furnished, provided for, &c. The freighting of a vessel where the crew and other necessaries for the voyage are provided by the general owner, is merely like hiring a house ready furnished, instead of hiring it empty, where the temporary ownership is no less in the hirer, in the former case, than in the latter.

Thursday, Feb. 17. *Absent*....WASHINGTON, *J.*

STORY, *J.* delivered the opinion of the Court as follows:

The Plaintiff in this case contends, that there was a total loss, which authorized an abandonment by both of the perils stated in the declaration viz.

1st. By the perils of the seas, and

2d. By barratry of the master.

And first, as to a total loss by the perils of the seas

It seems now clear that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port, of necessity, short of the port of destination. In such case, although the ship be in a capacity to perform the voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled as to be of little or no value, the insured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. It has therefore been held, that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of a total loss. It does not, however, appear that the exact quantum of damage which shall authorize an abandonment as for a total loss, has ever become the direct subject of adjudication in the English Courts. The celebrated treatise *Le Guidon, ch. 7, art. 1*, considers that a damage exceeding the moiety of the value of the thing insured, is sufficient to authorize an abandonment. This rule has received some countenance from more recent elementary writers; and, from its public convenience and certainty, has been adopted as the governing principle in some of the most respectable commercial states in the union; and perhaps is now so generally established as not easily to be shaken. 1, *John. c.* 141. 1, *John. R.* 335, 406. *Marsh. Ins.* 562. *Note* 92, *Am. edit.* 1810. *Park*, 194, 6 *edition.*

But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed. And perhaps, even as to an extinction in value, where the commodity specifically remains, it may yet be deemed not quite settled whether.

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under the like circumstances, it would authorize an abandonment for a total loss. *Dyson v. Rowcroft*, 3, *Bos. and Pull.* 474. *Maggrath v. Church*, 1, *Caines R.* 212. *Cocking v. Frazer*, *Marshall*, 227. *Park*, 152, *6th edition.*

The case before the Court is of a mixed character. It embraces articles of both descriptions; some within and others without the purview of the memorandum. If, in such a case, a deterioration exceeding a moiety in value, be a proper case of technical total loss, it will follow that, in many cases, the underwriter will, indirectly, be rendered responsible for partial losses on the memorandum articles. Suppose, in such a case, the damage of the memorandum articles were 40 per cent. and to the other articles 10 per cent. in the whole amounting to half the value of the cargo, the underwriter would be responsible for a technical total loss, and thereby made to bear the whole damage, from which the memorandum meant to exempt him. Indeed cases might arise in which the damage might exclusively fall on memorandum articles; and if it exceeded the moiety, in value, of the whole cargo, might load him with the burthen of a partial loss, in manifest contravention of the intention of the parties. A construction which leads to such a consequence cannot be admitted unless it be unavoidable. And we are entirely satisfied that such a construction ought not to prevail. The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles; and in order to effectuate this right, it is necessary, where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles. Upon this principle, on a cargo of a mixed character, no abandonment for mere deterioration in value during the voyage, can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo including the memorandum articles. The case is considered, as to the underwriter, the same as though the memorandum articles should exist in their original sound state. In this way, full effect is given to the contract of the parties. The underwri-

ter is never made responsible for partial losses on memorandum articles, however great; and the technical total losses for which alone he can be liable, are such as stand unaffected by the perishable nature of the commodity which he insures.

In the present case, the facts alleged by the Plaintiff do not show a depreciation of a moiety in value, excluding the memorandum articles. There is no evidence of the quantum of depreciation of any part of the cargo. The forced sales at Antigua could not, under the circumstances, constitute a medium by which to ascertain it. Admitting, therefore, the rule to be correct, that the party had a right to abandon where the depreciation exceeds a moiety of the value, the Plaintiff has not brought himself within that rule as applied to a cargo of a mixed character like the present. The Court below were right, therefore, in deciding that there was no total loss proved by the perils of the seas.

The next question is, whether there was a total loss by the barratry of the master. And this depends exclusively upon the consideration, who was owner of the brig for the voyage; for it is conceded, on all sides, that the conduct of the master was barratrous, if he was in a situation to commit that offence. Barratry is an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury. It follows, therefore, from the very terms of the definition, that it cannot be committed by a master who is owner for the voyage; because he cannot commit a fraud against himself. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship. A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. Such is understood to have been the case of *Vallejo v Wheeler*, Cowp. 143. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character

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or legal responsibility of ownership; such was the case of *Hooe & Co. v. Groverman* in this Court, 1 *Cr.* 214. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner. On examining the charter-party in the present case, there can be no doubt, from the terms and stipulations, that it falls within the latter class of cases. The master, who was the general owner, retained the exclusive possession, command and management of the vessel, and she was navigated at his expense during the voyage. The whole charter party, except the introductory clause, sounds merely in covenant. The ownership was not divested by the covenant of affreightment, and, consequently, the master was incapable of committing barratry. There was, then, no total loss on the second count in the declaration.

The opinion of the Circuit Court on this exception must be sustained. But there are other exceptions on the record, in which it is admitted by the parties that the Circuit Court erred. The points intended to be raised in these exceptions have, in effect, being decided by this Court in *Caze and Richaud v. the Baltimore Insurance Company*, at Feb. term, 1813. For the errors in these exceptions *the judgment must be reversed*, with directions to the Circuit Court to award a *venire facias de novo*.

1814. Feb. 12th.

HALL v. LEIGH AND AL.

Absent....WASHINGTON, *J.*

If two joint owners of merchandize consign it to a merchant for sale, and inform him that each owns one moiety; and if they give separate and va-

THIS case is so fully stated in the opinion of the Court that it is deemed unnecessary to add more than that HARPER *and* PINKNEY, *for the Plaintiff in error*, did not argue the case as there was no appearance for the Defendants in error, but simply stated that they contended that the separate instructions of each owner severed the joint interest, and cited 1, *Esp.* 117, *and Watson on Partnership*, 233, 234.

Feb. 18th....LIVINGSTON, *J.* delivered the opinion of the Court as follows:

This cause comes here on a writ of error to the Circuit Court of the United States, for the district of Maryland.

This action was brought by the Plaintiff, who was also Plaintiff below, to recover the proceeds of one hundred bags of cotton which had been shipped to the Defendants, and by them sold on commission.

At the trial it appeared that the Plaintiff, together with William Potts and Co. in 1807, made a joint shipment of two hundred bales of cotton to the address of the Defendants, who resided at Liverpool, to make sale thereof for their joint benefit. This cotton belonged one half to the Plaintiff, and the other half to Wm. Potts and Co. The shipment was accompanied by two letters to the Defendants, the one written by the Plaintiff bearing date 14th February, 1807, in which after advising them of the shipment, he adds, "Mr. Potts has written you on the "subject of his interest in this adventure, for myself "I have to request that you will after covering me in "cost and charges, make such disposition of my one "half the shipment as your own judgment may think "best for my interest."

The other letter was written by William Potts and Co. and is dated 5th February, 1807, in which they also advised the Defendants of the shipment which they say is "for account of Mr. Hall and ourselves each one half," and after directing what is to be done with their moiety, they observe that "under present circumstances, Mr. Hall "will decline drawing on his proportion, "as he wishes you to avoid selling at the present prices "as long as possible—we refer you to him for more "particular directions."

In another letter of the 18th April, 1807, the Plaintiff directed the Defendants that, after effecting sales of his half of the cotton, on the terms of his first letter, "they should pass the nett proceeds of his proportion to the credit of Messrs. W. Potts & Co. and furnish him

riant instructions, each for his own moiety, one of the consignors alone may maintain a separate action against the consignee for a violation of his separate instructions

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with sales and account current as soon as possible, to enable him to settle with those gentlemen here."

After the receipt of these letters, the Defendant on the 5th June, 1807, sold one hundred bags of the cotton on account of William Potts, and Co. at 17*d.* sterling per pound, and immediately advised them thereof.

The Defendants afterwards, that is on the 31st December, 1807, had the remaining one hundred bags of cotton, valued at 14*d.* sterling per pound, at which price they took it to themselves, and carried the amount to the credit of William Potts, and Co. and on the 1st March following, sold them at a higher price. The Plaintiff thinking the Defendant, guilty of a breach of orders, brought this action to recover damage, and on the preceding evidence, the Circuit Court was of opinion that he could not separately maintain an action against them, on which a verdict and judgment passed against him,

Although the purchase of this cotton was on the joint account of the Plaintiff, and of William Potts and Co. yet as, in its shipment to the Defendants, their distinct interests were not only disclosed, but as separate and variant instructions were given as to the disposal of it, and as, under these directions, the Defendants acted throughout the whole of their agency in this business, it is not easy to perceive on what ground they now allege that they can be liable only in a joint action in the names of the present Plaintiff, and of William Potts and Co. By their own conduct they have precluded themselves from every objection of this nature, for they have contracted, as to the one half of this property, with the Plaintiff, and as to the other moiety, with William Potts and Co. and it will be seen by a recurrence to the testimony, not only that their engagements with these parties are distinct, but of different kinds. In selling the proportion of W. Potts and Co. they had a discretion, but over the other they had no right to sell for less than cost and charges. This Court therefore is of opinion that the action was well brought, and that the judgment of the Circuit Court was erroneous and must be reversed.

THE COMMON COUNCIL OF ALEXANDRIA v. PRESTON.

1814. Feb. 18th.

Absent....WASHINGTON, *J. and* JOHNSON, *J.*

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria.

A purchaser of real estate in Alexandria is not personally liable for arrears of taxes assessed before his purchase.

This was a motion in the Court below for judgment, and execution against Preston, (under the 11th section of the act of congress of 25th of February, 1804, "to amend the charter of Alexandria," *vol. 7, p. 48*) for taxes due to the corporation for the years 1804, 5 and 6, on a lot of ground in Alexandria, which Preston purchased of Scott in the year 1807, after the taxes were due. The assessors' books were returned on the 1st of May in every year to the office of the clerk of the common council, where they remained subject to public inspection.

The Court below, being of opinion that the summary remedy by motion, judgment, and execution, was given only against the person who was proprietor at the time of the assessment of the taxes, dismissed the motion; and the common council brought their writ of error.

The 11th section of the act to amend the charter of Alexandria is as follows:

"*Be it further enacted*, That whenever taxes upon "real property, or other claims charged upon real pro- "perty within the town, shall be due and owing to the "common council, and *the proprietor* shall fail to dis- "charge the same, the said common council, after "giving the party reasonable notice when he resides in "town; sixty days notice when he resides out of the "town and in the United States; and after six months "publication in the newspapers when he resides out of "the United States; shall be empowered to recover the "said taxes or debts, by motion in the Court of Alex- "andria; and, provided it shall appear to the satisfac-

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"tion of the Court that such taxes or claims are justly "due, judgment shall be granted and an execution shall "issue thereupon, with the costs of suit, against the "goods and chattels of *the defaulter*, if any can be found "within the town; if not, that the whole property, upon "which the tax or claim is due, shall, by order of the "Court, be leased out at public auction for the shortest "term of years that may be offered, on condition that "the lessee pay the arrearages, and also the future "taxes accruing during the term, and be at liberty to "remove all his improvements at the expiration of the "lease; provided always that the common council may "prosecute any other remedy, by action, for the re-"covery of the said taxes and claims which is now pos-"sessed or allowed."

E. I. LEE, *for the Plaintiff in error.*

The question arising upon this case is, whether the proprietor, for the time being, of a lot in Alexandria, is personally liable to a judgment and execution for arrearages of taxes assessed upon the lot before he became the proprietor thereof.

The act of congress gives a remedy, by motion, judgment and execution, against the *proprietor* who shall fail to discharge the taxes. Preston was the proprietor at the time of the demand of payment, and has failed to pay. He is therefore within the express letter of the law. "The *defaulter*" also is the person who has failed to pay on demand; the person who was liable to pay when the demand was made upon him. Every proprietor of the land is liable for its taxes so long as he is proprietor. The claims, according to the words of the act, are *charged upon* the real property. They accompany the land into whose hands soever it may pass. The law was intended to give a remedy against any proprietor of the land. The taxes are placed on the same footing as *other charges* which are liens on the land. It is not a case of greater hardship than that of other liens on real estate. *Caveat emptor* is the rule where he has the means of knowledge. Here the assessors' books were always accessible. The purchaser is bound to take notice of the non-payment of the taxes. He purchases at his peril.

SWANN, *contra.*

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The statute uses the definite article, "THE *proprietor.*" The question is, *which* proprietor? Scott or Preston? We say it means him who was proprietor when the tax was laid, and in whose name the land was assessed, and who was *unquestionably* liable in the first instance. *He* was "the proprietor," "the defaulter" contemplated by the legislature. If *he* was liable, did his liability cease when he sold the land? or is he still liable? There is nothing in the law to justify an inference that the legislature contemplated a succession of proprietors who should be successively liable; a succession of debtors; nor that they should be all liable at once; nor that the corporation should have its choice out of the several successive proprietors. It suggests the idea of *one* proprietor only, and of one debtor, or defaulter only; and if but one, it can be no other than him who was confessedly liable; him who was proprietor at the time of the assessment. The tax is a lien on the lot so far as to authorize the Court to direct it to be leased out to any one who will pay the taxes, in case the goods and chattels of the debtor cannot be found.

The books of the assessor and collector are not matter of record. The purchaser has no *right* to inspect them. The tax is a secret lien.

February 19th....THE COURT *affirmed the judgment*, without assigning their reasons.

PLEASANTS v. THE MARYLAND INSURANCE COMPANY.

1814. Feb 12th.

ERROR to the Circuit Court for the district of Maryland in an action upon a policy of insurance, dated on the 18th of May, 1810, on the cargo of the brig Elizabeth from St. Petersburgh or Cronstadt to Philadelphia, against all risks, for 6,000 dollars, "*valuing*

When a cargo is insured by diverse policies, in some of which the rate of exchange is fixed at which

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the invoice ruble at 46 cents." The invoice amounted to 95,565 71 rubles, equal, at 46 cents per ruble, to $43,960 28.

Before this policy was made the Plaintiff had effected eight other policies in Philadelphia to the amount of 36,900 dollars. In the first seven of these policies there was no valuation of the ruble; but in the eighth it was valued at 40 cents. The Defendants, at the time of executing *this* policy, had no knowledge of those affected in Philadelphia.

the prime cost of the cargo shall be valued; in ascertaining the amount of the interest of the insured, upon settlement of those policies in which the rate of exchange is fixed, the whole cargo is to be valued at that rate of exchange, without regard to the rate of exchange by which the value may have been ascertained in the other policies.

The vessel and cargo were captured by a Danish vessel and condemned. The Plaintiff abandoned in due time.

The underwriters at Philadelphia paid. But on settlement of the seven first policies, in which the value of the ruble was not fixed, and which insured 29,900 dollars, the underwriters, in order to ascertain whether the Plaintiff's interest in the cargo amounted to the sum insured by those policies, viz.: 29,900 dollars, insisted upon fixing the value of the ruble at thirty-three and a third cents.

On settlement of the eighth policy, which valued the ruble at forty cents, and which insured 7,000 dollars, the calculation (in order to ascertain whether the Plaintiff had still a sufficient interest left to entitle him to receive the 7,000 dollars insured by that policy) was made by converting the whole amount of the invoice into dollars at 40 cents per ruble, and deducting therefrom the 29,900 dollars received upon the seven preceding policies. By this mode of calculation it appears (according to the statement in the bill of exceptions which, however, does not seem to be accurate) that after the Plaintiff had received the 29,900 dollars insured by the seven first policies, and the $7,000 insured by the eighth policy, his remaining interest to be covered by the ninth policy, was only 1,481 71 rubles, equal, at 46 cents per ruble, to 682 dollars, 58 cents.

But if, on settlement of this last policy, the Plaintiff is entitled to have the value of his interest in the cargo ascertained by converting the whole amount of the in-

voice into dollars, at the rate of 46 cents per ruble, and deducting therefrom the 36,900 dollars covered by the eight prior policies, then his remaining interest to be covered by this policy would be more than the 6,000 dollars insured thereby.

The only question saved by the bill of exceptions at the trial below, was whether the Plaintiff should recover according to the first or according to the latter mode of calculation.

The Plaintiff contended for the latter, but the Court over-ruled him, and directed the jury that he was only entitled to recover according to the former—they found a verdict accordingly: whereupon the Plaintiff brought his writ of error.

The point was now submitted to the Court without argument, by HARPER for the Plaintiff in error, and JONES and PINKNEY for Defendant.

February 21st.....All the Judges being present,

JOHNSON, J. delivered the opinion of the Court as follows:

This is the case of an insurance on a voyage from St. Petersburgh or Cronstadt to Philadelphia, effected in the year 1810. The vessel was captured and the assured abandoned. The only difficulty arises on the principles upon which the loss shall be adjusted.

Besides this policy, eight others were effected in Philadelphia. In seven of them no valuation was attached to the ruble. In the eighth it was valued at 40 cents, and on this, which was the ninth in order, at 46 cents. In settling the seven first the ruble was estimated at thirty-three and a third cents, which was the receiv d value at Philadelphia. On the eighth it was settled at the stipulated value of 40 cents. The value of goods laden on board the ship was proved to be 95,565 rubles. The sums paid on the eight first policies corresponded to the adjusted value of 94,084 rubles, leaving a balance of only 1,481: equal, at 46 cents, to about 682 dollars unpaid. But if the whole amount of

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the cargo be brought into dollars at 46 cents to the ruble, and the sum in dollars actually paid on the other policies be deducted, there will still remain more unpaid than would exhaust the whole sum underwritten on the ninth policy.

On the part of the Defendant it is contended that the compensation paid to the Plaintiff on the other policies, is absolute and complete as to the corresponding amount in rubles, leaving only 1,481 unpaid. On the other hand, the Plaintiff contends that the compensation was only relative, and cannot affect his rights as between himself and this Defendant. And of this opinion is the majority of the Court.

The object to be attained is, to secure to the assured a fair indemnity under all the advantages which he has purchased of the insurers.

The intention of the parties, in attaching a fixed value to the ruble, appears in the order for insurance, to wit: "to distinguish between the paper and specie ruble."

It is very well known that the ruble is the money of account in Russia. It was originally a coin corresponding in value to the American dollar. But by the forced circulation of a paper representative of the ruble, dependent on nothing but mere national faith or national force for its value, the silver ruble has nominally doubled or trebled itself in value. The astonishing and rapid fluctuation in its value appears from the evidence in this case, in which it is stated that in the year 1810 it varied from forty-eight to twenty-five cents.

To secure the assured against the effects of this fluctuation, was the object of the parties in attaching a specific value to the ruble; and as the whole cargo would be affected in value by this cause, and the policy was upon the cargo generally, we are of opinion that no other principle in calculating the loss would afford him the indemnity stipulated for in the policy.

The principle contended for by the Defendant is subject to this obvious objection that it is not reciprocal.

Had the adjustment of the value of the ruble in the other cases exceeded forty-six cents that adjustment would not in any respect have resulted to his benefit.

There is one difficulty of which the Court are fully aware, which is, that the interest assigned in the abandonment if estimated in rubles will be inversely as the rate at which the ruble is estimated, so that he who pays most would acquire least. But in this case the objection does not arise; as the Plaintiff by a compromise with the underwriters on some of the other policies has reserved a sufficient interest in the subject of abandonment, to meet the just claims of these underwriters. And in no case would this consideration create a difficulty as between the parties to a policy. Among the underwriters alone in the distribution of the proceeds of the thing abandoned would it be necessary to determine on the correct rule to be applied in such a case.

Had the policy, which is the subject of this suit, been a valued policy, and declared the value of the whole cargo to be $43,929, the actual amount at the stipulated valuation of the ruble, the same objection would have presented itself, but certainly would not have availed to prevent a recovery.

The judgment below must therefore be reversed and the case remanded.

M'CALL AND AL.

v.

THE MARINE INSURANCE COMPANY

ERROR to the Circuit Court for the district of Maryland.

If a policy insures against "unlawful arrests, restraints and detainments of all kings, princes," &c. the qualification, "unlawful,"

This was an action on a policy underwritten by the Defendants, upon all kinds of lawful goods and merchandize, on board the ship *Cordelia*, on a voyage from the Island of Teneriffe, to Surabaya, and at and from

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thence to Philadelphia, warranted American property. The ship sailed on the voyage, on the 5th of April, 1811, having on board a cargo of lawful goods, the property of the Plaintiffs, of the value of 15,000 dollars, and pursued the voyage until the 18th of July following, when, being in a place called Madura Bay, within about twelve hours sail of Surabaya, she was boarded by an officer of a British frigate, forming one of a squadron, then actually blockading the port of Surabaya, and all the other ports of the islands of Java and Madura. The frigate took possession of the Cordelia, and conducted her to the admiral commanding the blockading squadron, who, on the next day, dismissed the Cordelia, after indorsing her papers, and warning the master not to enter the port of Surabaya, or any other port in the island of Java, or of the island of Madura, on pain of capture. On the same day, the Cordelia made another attempt to enter Surabaya, but was chased by the same British frigate, and taken possession of a second time. After being detained two days, the Cordelia, was again released, and the master was ordered to depart instantly from the coast of Java, and the neighborhood of Surabaya, upon penalty of capture, and impressment of his men. The master, finding it impracticable to pursue his voyage further, resolved to return to Philadelphia, where he arrived on the 19th of November, 1811. At the time of sailing on the voyage from Teneriff, the blockade of Java was unknown to the parties. The Plaintiffs abandoned to the Defendants, immediately after the arrival of the Cordelia at Philadelphia, which gave them the first knowledge of the occurrences. The Defendants refused to accept the abandonment.

extends in its operation as well to "restraints and detainments" as to "arrests;" and in such case, a detainment by a force lawfully blockading a port is not a peril insured against by a policy containing a warranty of neutrality.

The policy contained the usual risks, except that the word "*unlawful*," was printed before "*arrests*," so that the clause stood, "*unlawful arrests, restraints, and detainments of all kings, princes, or people of what nation, condition or quality soever.*" The declaration alleges, that the ship and cargo were, during the voyage, "by persons acting under the authority of the British government, and by a certain ship of war belonging to that government, unlawfully seized, restrained, and detained," and thereby become totally lost.

The Circuit Court directed the jury, that, on this

state of facts, the Plaintiffs were not in law entitled to recover; to which the Plaintiffs excepted and brought this writ of error.

HARPER. *for the Plaintiffs,*

Insisted that this direction was erroneous; because the voyage was broken up, and lost.

1st. By men of war;—

2d. By *detention of princes*; the blockade having prevented the accomplishment of the voyage.

That the Plaintiffs had therefore a right to abandon, and were entitled to recover for a total loss.

In support of his argument, he cited the case of *Barker v. Blakes*, 9 *East*, 280, cited also in 2 *Marshall*, 835, *Appendix*.

JONES, *contra.*

This case is very distinguishable from that of *Barker v. Blakes.*

1st. In that case, the voyage was interrupted as to the ultimate and only port of destination. Here, there was an interruption as to an intermediate port only, which cannot, we contend, constitute a total loss. The adventure from Teneriffe to Philadelphia, might have been as profitable as the accomplishment of the whole voyage.

Another distinction between the two cases arises from the different phraseology employed in the respective policies. The English policy employs general words, so as to include *any* detention of princes, &c. Here, the policy is limited to *unlawful* detention of princes, &c. Unless, therefore, this detention can be shown to be unlawful, the case is not within the policy; and it is clear, that it was not unlawful, unless the blockade was so. But this is not contended; the blockade was maintained by an adequate force, and was in every respect conformable to the law of nations.

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Again, in the case of *Barker v. Blakes*, the blockade of Havre was not considered as the cause of the destruction of the voyage; the detention in Bristol, was the only ground of loss. Here, on the contrary, the blockade is the sole ground of abandonment.

The abandonment itself, in the case now before the Court, is liable to objection. An abandonment, to be valid, ought to be made during the impediment that causes the loss. But in this case, the abandonment was not made till long after the impediment had ceased.

PINKNEY, *same side.*

It was contended by the Defendants in the Court below, that they were not liable for the loss in this case,

1st. Because, under the words of the policy, that loss did not arise from any peril insured against

2d. Because the Plaintiffs had violated their warranty of neutrality.

3d. Because at the time when the abandonment was made, the property was not under the restraint of princes.

The same grounds of defence are now relied upon.

And, first, as to the words of the policy. This instrument insures against "*unlawful* arrests, restraints and detainments of all kings, &c. The word "*unlawful*" is that which the Defendants consider as taking the present case out of the policy. This word is not inserted in the English policies, but has been introduced into those of the Marine Insurance Company and some other American offices. Some meaning must be given to the term, and that can be no other than the most usual meaning; so that unless it can be made to appear that the detainment in this case was *unlawful*, the Defendants cannot be considered as liable. But, as has been said before, the blockade, which was the cause of the detainment, was lawful; the detainment itself was therefore lawful, under the acknowledged law of nations.

2d. As to the warranty of neutrality.

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When the voyage was undertaken, and the policy underwritten, neither party knew that the port of destination was blockaded; but the underwriters protected themselves by a warranty of neutrality, and the assured consented to give it.

The import of the warranty is that the voyage shall be performed in a neutral manner; and, consequently, that if the vessel should find the port blockaded, she will discontinue the voyage. She does find it blockaded; and not only physical force, but *the law of nations* and *the warranty* oblige her to forbear the completion of the voyage. She nevertheless attempts to enter the port, and that, too, after being warned off by the admiral commanding the blockading squadron. Has the assured in such a case, a right to set up the *compliance with his own warranty* as the foundation of a total loss, or of any loss? With such a warranty in the policy, can the underwriter be considered as engaging that, if the port of destination should be found blockaded, the voyage shall be completed? If such *is* his engagement, then he stipulates that the vessel shall violate the warranty; because without a violation of it, she cannot reach her port of destination, if she finds it blockaded. It is plain that his undertaking is only for a *neutral* voyage; and, therefore, that, the moment it becomes unneutral, the policy is discharged by force of the warranty acting upon the whole contract.

Cases upon the British *orders in council* are far less strong than this; for they made no blockade acknowledged by the law of nations. Physical force was there every thing; and neutral duties were not affected by them. But here, the neutral obligations of the vessel turn her back, and intercept her path, and extract the case out of the policy.

3d. Here was no restraint of princes. Restraint must be *physical*; and an abandonment, to be of any avail, must be made during such restraint. In the present case the physical restraint continued but one day; all afterwards was mere *moral* restraint, arising from the threat of capture and confiscation as prize of war. But

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an *apprehension*, though just and reasonable, is not sufficient to justify an abandonment. 3, *Bos. and Pul.* 392, *Hadkinson v. Robinson.* 5, *Esp. Ca.* 50. 1, *Campbell, Black v. Hagen.* See, also, the case of 6, Mass. T. R. 118, where the Court decided that *apprehension* alone would not justify an abandonment; and, also, that if the master, after being once warned off, had made another attempt to enter the blockaded port, it would have been barratry.

HARPER, *in reply*.

1st. With regard to the wording of the policy. It is unnecessary to examine what effect the term, "unlawful," may have upon the subsequent words, inasmuch as the declaration states the loss to have been occasioned by *men of war*, with which the word "unlawful" had no connexion. But if such examination be made, it will appear that this term applies only to the word "*arrests*," which, in the original printed form of the policy, was separated from the following part of the sentence by a comma, and was therefore the only word qualified by the preceding term "*unlawful*." The pointing of the sentence was the act of the parties, and, as such, material, and as much a part of the contract as the words themselves.

2d. As to the violation of the warranty of neutrality. The loss was complete before the second attempt to enter the blockaded port; and therefore could not have happened by reason of that attempt; consequently, the right of the Plaintiffs to recover, could not be affected by that or any other act of the master, subsequent to the original loss, however inconsistent with neutrality that act might be.

3d. With regard to the time of abandoning: the Plaintiffs abandoned immediately after the arrival of the Cordelia at Philadelphia, which gave them the first information of the loss. To have expected them to abandon before they knew any thing of the loss would have been absolutely inconsistent with reason.

The cases cited from *Bos. and Pul.* and the *Mass. T. R.* are essentially different from the present, inasmuch

as in those cases, there was no *physical* force to prevent the prosecution of the voyage. *Park. 226, (6th Ed.) Blacketshager v. the London Assurance Company.*

Monday, February 21st....Present all the Judges.

STORY, *J.* after stating the facts of the case, delivered the opinion of the Court as follows:

The Court below, at the trial, held that the Plaintiff, under the circumstances, was not entitled to abandon as for a total loss; and the correctness of that opinion remains for the decision of this Court.

Whether the turning away of a ship from the port of destination in consequence of a blockade, be, in any case, a good cause for abandonment, so as to entitle the assured to recover from the underwriter as for a total loss by the breaking up of the voyage; and, if so, whether the doctrine could apply to a policy with a warranty of neutrality, the legal effect of such warranty being to compel the party to abandon the voyage, if it cannot be pursued consistent with neutrality, are questions of great importance, upon which the Court do not think it necessary to express any opinion, because this cause may well be decided upon an independent ground.

The loss of the voyage, in the case at bar, was occasioned (if at all) by the arrest and restraint of the British blockading squadron. The right to blockade an enemy's port with a competent force, is a right secured to every belligerent by the law of nations. No neutral can, after knowledge of such blockade, lawfully enter, or attempt to enter, the blockaded port. It would be a violation of neutral character, which, according to established usages, would subject the property engaged therein to the penalty of confiscation. In such a case, therefore, the arrest and restraint of neutral ships attempting to enter the port is a *lawful* arrest and restraint by the blockading squadron. It would follow, therefore, from this consideration, that the arrest and restraint, on account of which a recovery is now sought, is not a risk within the policy against which the underwriter has engaged to indemnify the Plaintiff.

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But it is contended by the counsel for the Plaintiff, in order to escape from this conclusion, that the word "unlawful," in the policy, is confined in its operation to *arrests*, and does not extend to "restraints and detainments." To this construction the Court cannot assent. The grammatical order of the words and the coherence of the sentence require a different construction. It is not against every "unlawful arrest" that the underwriter undertakes to indemnify, but against "unlawful arrests, &c. of all kings, princes, and people," which have always been held to mean the arrests of kings, princes, or people, in their sovereign and national capacity, and not as individuals. The necessary connexion of the sentence, therefore, requires that "arrests, restraints and detainments," should be coupled together; and, if so, the qualification of *unlawful* must be annexed to them all. The intent of the parties, also, urges to the same conclusion; for every arrest is a restraint and detainment; and it would be strange if the party could, under the allegation of a restraint, recover a loss from which the underwriter is expressly exempted by an unambiguous exception in the policy.

On the whole, the Court are of opinion that the judgment of the Circuit Court must be affirmed.

1814. Feb. 9th.

SMITH AND OTHERS *v.* EDRINGTON.

Present.....All the Judges.

Under the statute of Virginia respecting wills, it is necessary (in order that lands acquired after the date of the will may pass by the will) that the intention of the testator should clearly appear upon the face of the will.

THIS was an appeal from the Circuit Court for the district of Virginia, sitting in chancery.

The bill sought to charge the lands of Christopher Edrington in the hands of his son and heir at law, W. P. Edrington, with a debt due by his father, Christopher Edrington, to the Complainants, by *simple contract.*

It was contended that the lands passed, by the will of Christopher Edrington, to his son, W. P. Edrington, charged with the payment of the debts of the testator,

although the lands were acquired by the testator after the date of the will.

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The will expressed a desire that all the just debts of the testator should be paid by his executors as soon as the means in their power should permit. It also authorized his executors to dispose of and convey any of his property that might be necessary for payment of his debts; and afterwards it has these expressions, "should "my son, Wm. P. Edrington, to whom I bequeath the "whole of my property, after the payment of my debts, "and provisions above made, die under the age of 21 "years, I then give," &c. The testator then proceeds to make certain pecuniary bequests, in the event of his son's so dying, and concludes by disposing of the residue of his property.

At the date of the will the testator had no lands. Those which the bill sought to charge were purchased a short time before his death.

By an act of the legislature of Virginia, in force at the date of the will, 1 *Rev. Co. P. P.* 160, it is enacted, "that every person aged 21 years and upwards, being "of sound mind, and not a married woman, shall have "power, at his will and pleasure, by last will and testa- "ment in writing, to devise all the estate, right, title "and interest in possession, reversion, or remainder, "which he hath, *or at the time of his death shall have,* "of, in, or to lands," &c.

The Court below dismissed so much of the Complainant's bill as sought to charge the lands in the hands of the heir, and they appealed to this Court.

E. I. LEE, *for the Appellants.*

The only question in this case is, whether the lands passed by this will to the devisee, W. P. Edrington. For if they did, he took them subject to the debts of his father, by the terms of the will.

By the statute they would pass, if such was the intention of the testator.

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That such was his intention is to be inferred from the following facts which appear in the case.

It is evident from the will that he meant to dispose of his *whole estate;* and that his just debts should be paid at all events. He bequeaths to his son, his *whole property, after payment of his debts,* and certain specific legacies. In the summer of 1803 or 1804, the testator offered to convey this land in payment of his debt to the Complainants, which shows that he looked to the land as a fund for that purpose, and that he did not mean to cheat his creditors by converting his personal estate into lands.

The intention of the testator is to be collected not only from the words of his will, but from his act. 1 *Wash.* 96, *Kennon v. M'Roberts*—*id.* 266, *Shermer v. Shermer.*

TAYLOR, *contra.*

Under the statute of *Hen.* 8 (of wills) it has always been holden in England that no after-purchased lands can pass by a will. This will must have the same construction as if the devise had been to a stranger instead of the heir at law. It must have been the intention of the testator, at the time, to devise what he had, not what he had not. It does not appear that he even contemplated a purchase of lands. Under the first part of his will it is clear that he alludes only to personal estate.

In the case of *Hamersly v.* 3 *Call.* 289, it is said by the Court of appeals of Virginia, that the intention to devise after-acquired lands must appear by expressions applicable to that *kind* of property.

February 23*d*....WASHINGTON, *J.* delivered the opinion of the Court as follows:

This was a bill filed on the equity side of the Circuit Court for the district of Virginia by the Appellants, in order to charge the real estate of Christopher Edrington in the hands of his son and heir at law, William P. Edrington, with the payment of a debt due to the Ap-

pellants by Christopher Edrington, the father. The appeal being taken from that part of the decree of the Circuit Court which dismissed the bill so far as it seeks to subject the real estate in the hands of Wm. P. Edrington to the payment of the Appellant's demand, the only question now to be considered is, whether the will of Christopher Edrington can be so construed as to charge his real estate with the payment of his debts?

The clauses of the will relied upon by the Appellant's counsel for this purpose, are that which expresses the devise of the testator that all his just debts should be paid by his executors, &c. so soon as the means in their power should permit; also another, which authorizes his executors to dispose of, and convey, any of his property that might be necessary for payment of his debts; and a third, which is still stronger, and is expressed as follows: "Should my son, Wm. P. Edrington, to whom I bequeath the whole of my property, after the payment of my debts and provisions above made, die under the age of 21 years, I then give," &c. The testator then proceeds to make certain pecuniary bequests in the event of his son's so dying, and concludes by disposing of the then residue of his property.

At the time that this will was made it is admitted that the testator was not possessed of or entitled to any estate in land, but that afterwards, and a short time previous to his death, he purchased the tract of land which this bill seeks to charge. By an act of the legislature of Virginia, passed in the year 1785, and long before the date of this will, it is declared "that any person aged 21 years and upwards, being of sound mind, and not a married woman, shall have power, at his will and pleasure, by last will and testament in writing, to devise all the estate, right, title, and interest, in possession, reversion, or remainder, which he hath, or at the time of his death shall have, of, in, or to lands," &c. The circumstance, therefore, that the land in question was acquired after the execution of the will, presents no difficulty in this case, if it appears that it was the intention of the testator to devise it to his son; because if it passes at all under the will, it may readily be admitted that the devisee took it subject to the payment of the testator's debts; the parts of the will above recited being

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strong to impose such a charge. But although a testator may, under the above law, dispose by will of after-purchased lands, it is nevertheless necessary that his intention to make such a disposition should clearly appear upon the face of the will. The rule in England, as well as in Virginia, at the time this law was passed was, that a will, as to land, speaks at the date of it, and, as to personal estate, at the time of the testator's death. The law created no new or different rule of construction, but merely gave a power to the testator to devise lands which he might possess, or be entitled to, at the time of his death, if it should be his pleasure to do so. The presumption is, that the testator means to confine his bequests to land to which he is then entitled; and this presumption can only be over-ruled by words clearly showing a contrary intention.

In this will there are no expressions which indicate an intention to devise, or in any manner to charge, lands which the testator might afterwards acquire. It does not appear that the testator contemplated, at the time he made his will, the purchase of any land, and the words, "*estate*" and "*property*," to be found in it, may be fully satisfied by applying them to the personal property of which he was possessed.

It is therefore the opinion of the Court that there is no error in the decree of the Circuit Court, and that the same ought to be affirmed with costs.

BEALE v. THOMPSON AND MARIS.

1814. Feb. 18th.

Absent..., WASHINGTON *J.* & JOHNSON, *J.*

ERROR to the Circuit Court for the district of Columbia.

It is a fatal objection to a deposition taken under the judiciary act of 1789, sect. 30, that it was opened out of Court.

On the trial in the Circuit Court below, the Defendant, *Beale*, offered in evidence, the deposition of Tunis Craven, taken before the judge of the district Court of the United States, for the district of New Hampshire, under the *30th sec. of the judiciary act of Sep. 24th*, 1789, *vol. 1, p. 88*, which, after prescribing the mode of taking

depositions, directs that "the depositions so taken shall be "retained by such magistrate until he deliver the same "with his own hand into the Court for which they are "taken; or shall, together with a certificate of the rea- "sons aforesaid of their being taken, and of the notice, "if any, given to the adverse party, be, by him, the "said magistrate, sealed up and directed to such "Court, and remain under his seal *until opened in Court.*"

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The deposition was sealed up by the judge, but directed to the *clerk* of the Court, and he, supposing it to be a letter respecting his official business, *opened it out of Court.*

The Court below rejected the deposition; which being stated in a bill of exceptions, the Defendant, Beale, brought his writ of error.

The question respecting the informality of opening the deposition out of Court, was not argued in this Court, there being another objection to it, which the counsel deemed more important, viz: that the deponent was the drawer of the note upon which the suit was brought against the Defendant, Beale, as indorser; the purport of the deposition being to show that Beale had not due notice of the non-payment of the note by the deponent.

LAW & JONES, *for the Plaintiff in error.*

MORSELL, *for the Defendants in error.*

Feb. 23*d*....STORY, *J.* delivered the opinion of the Court as follows:

The single point in this case is whether the Circuit Court of the district of Columbia, erred in rejecting the deposition of Tunis Craven.

Independant of all other grounds, the Court are of opinion that the fact of the depositions, not having been opened in Court, is a fatal objection.

The statute of *24th September*, 1789, *ch.* 20, *sec.* 30, is express on this head.

The judgment of the Circuit Court must be *affirmed.*

1*. CLEMENTSON *v.* WILLIAMS.

Feb. 14th.

Absent....WASHINGTON, *J.*

An acknowledgment of the original justice of a claim is not sufficient to take the case out of the statute of limitations; the acknowledgment must go to the fact that it is still due. The statute of limitations is entitled to the same respect with other statutes, & ought not to be explained away. Quere, whether an acknowledgment by one partner, after dissolution of the partnership, is sufficient to take a case out of the statute of limitations?

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria.

The facts of the case are thus stated by the *Chief Justice*, in delivering the opinion of the Court:

The Plaintiff instituted a suit against James Williams and John Clarke, merchants and partners trading under the firm of *John Clarke & Co.* The writ was executed on Williams only, who pleaded *non assumpsit* and *the act of limitations*, on which pleas issues were joined. The jury found that the Defendant did not assume; and judgment was rendered in his favor.

At the trial the Plaintiff gave evidence tending to prove the partnership, and also to prove dealings of Clarke & Co. with the Plaintiff. He then offered a witness who proved that he presented, in December preceding the trial, to John Clarke a certain account against the said John Clarke & Co. in favor of the Plaintiff; and that said Clarke stated that the said account was due, and that he supposed it had been paid by the Defendant, but had not paid it himself, and did not know of its being ever paid. And the witness to whom the said Clarke made the said acknowledgment produces in Court the identical account so presented to said Clarke and acknowledged by him as aforesaid, which account is in the words and figures following, to wit: "an account," &c. And the Plaintiff's counsel offered the contents of said account and the acknowledgment of said Clarke in evidence under the issue joined upon the plea of the statute of limitations, but the Court decided that the said evidence so offered by the Plaintiff of the contents of the said account and of the acknowledgment of the same by the said Clarke was not admissible evidence in this cause, and refused to admit the same." To this opinion the Plaintiff excepted, and from the judgment of the Circuit Court he has appealed to this Court.

TAYLOR, *for the Plaintiff in error.*

The only question is, whether the acknowledgment of one partner, after the dissolution of the partnership, takes the case out of the statute of limitations.

We contend that it does, and rely on the following cases: *Doug.* 651, *Whitcomb v. Whiting.* 2 *H. Bl.* 340, *Jackson v. Fairbanks, and* 2 *Johnson,* 667, *Smith v.*

F. S. KEY, *contra.*

Although the opinion of the Court may be supported upon other grounds, yet it may also be supported upon the point raised, viz.: that the acknowledgment of one partner, after dissolution of the copartnership, cannot be received to take the case out of the statute. It can only be evidence of a new promise, and one partner cannot, after dissolution, bind the other. No acknowledgment of the debt by one partner, after dissolution, can be given in evidence on the *general* issue to fix the debt upon the other partner. The cases in *Douglass and H. Blackstone* are different. The joint concern was not dissolved. The authority in Johnson was only a *dictum;* the case was decided upon other evidence.

Such evidence would be extremely dangerous. No man could be safe if, after dissolution of the partnership, his partner could continue to bind him forever. At all events it is necessary that the Plaintiff should first prove the original debt by other evidence.

JONES, *in reply.*

If the opposite doctrine be correct, then, even if each of the partners should acknowledge the debt, the evidence would not support a joint action.

The acknowledgment is not considered as a new promise, but simply as rebutting the presumption of payment arising from the length of time, and thereby taking the case out of the reason of the statute.

Feb. 19*th*....MARSHALL, *Ch. J.* after stating the facts of the case, delivered the opinion of the Court as follows:

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It is contended by the Plaintiff in error that, after the dissolution of the partnership, the acknowledgment of one partner is evidence to revive the original cause of action against both, and that the acknowledgment made in this case by Clarke is sufficient for that purpose.

It has been frequently decided that an acknowledgment of a debt barred by the statute of limitations, takes the case out of that statute, and revives the original cause of action. So far as decisions have gone on this point, principles may be considered as settled, and the Court will not lightly unsettle them. But they have gone full as far as they ought to be carried, and this Court is not inclined to extend them. The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away.

In this case there is no promise, conditional or unconditional; but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not then sufficient to take the case out of the act, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due.

In the case at bar, the acknowledgment of John Clarke is that he had not discharged the account presented to him, but he does not say that it was not discharged. His partner may have paid it without the knowledge of Clark, and, consequently, the declaration of Clarke that he had not himself paid it, and that he did not know whether his partner had paid it or not, is no proof that the debt remains due, and therefore is not such an acknowledgement as will take the case out of the statute of limitations.

There is no error, and the judgment is affirmed with costs.

GRACIE 1814.

v. Feb. 16th.

THE MARINE INSURANCE COMPANY OF BALTIMORE.

Absent....WASHINGTON, *J.*

ERROR to the Circuit Court for the district of Maryland.

A policy on goods to be safely landed at Leghorn, is discharged by landing them at the Lazaretto; that being the usage of the trade. Quere, whether ransom can be recovered where there is a warranty against particular average?

The facts of the case, as stated by MARSHALL, *Ch. J.* in delivering the opinion of the Court, were as follows:

This case arises on a policy of insurance bearing date the 19th of June, 1807, for $ 20,000 on the cargo of the ship Spartan, "at and from Baltimore to Leghorn," the risk to commence on the loading, and to continue "until the said goods shall be safely landed at Leghorn aforesaid."

The policy contained, in the printed part, the usual stipulation that the assured, in case of loss, shall labor, &c. for the preservation and recovery of the goods, to the expense of which the assurers would contribute according to the rate of the sum insured; in the policy is inserted, in writing, the words "warranted free from particular average."

The vessel sailed from Baltimore in June, 1807, and on the 15th of August arrived in the port of Leghorn.

According to the laws and usages of the place, ships arriving at that port, and their cargoes were, obliged to perform a quarantine of thirty days before admission of the cargo, or of any person on board, into the city; the ships performing it in the port, the cargoes in a certain Lazaretto erected for that purpose on the shore of the port about half a mile from the city. Some specified articles were excepted from this rule, but the cargo of the Spartan did not come within the exception. On the arrival in port of a vessel liable to quarantine,

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the officers of government took possession of the cargo, and removed it in public lighters to the Lazaretto. Freight was earned upon the depositing of the cargo in the Lazaretto, but payment of it, though often made before, could not be enforced until after the expiration of the quarantine, and until payment, the lien for the freight continued on the goods. The duties also accrued in the Lazaretto, and until they were paid, the goods could not be removed thence into the city.

The goods remained in the custody of the officers of government until the expiration of the quarantine, during the continuance of which, neither the master of the ship, nor the consignees had any power to interfere with, or even see, them, but under a permit from the local authorities; such permits were commonly allowed the consignees, who might take samples, and sell by those samples, while the goods were performing quarantine.

After quarantine was performed, and an order from the master obtained, the goods were received at the Lazaretto by the owner or consignee, and transported at his risk and expense into the city. This transportation was most usually made by water; but there was a road along which light goods might be, and frequently were, carried. Even when goods were sold during the quarantine, they were removed at the risk and charge of the vendors.

In conformity with these regulations, the cargo of the Spartan was placed in the Lazaretto. While it remained there, performing quarantine, a body of French troops took possession of the city, seized the Lazaretto, sequestered the goods there deposited, and refused to give them up until a ransom, amounting to 53 per cent. on their estimated value, should be paid for them. This ransom the owners or consignees were compelled to pay in order to obtain restitution of their goods. This action is brought to recover it from the underwriters.

Judgment was rendered in the Circuit Court for the Defendants, which judgment is now brought before this Court by a writ of error.

HARPER, *for the Plaintiff in error*, contended,

1st. That the landing at the Lazaretto was not a *landing in safety at Leghorn*, within the meaning of the policy.

2d. That the Plaintiff is not prevented, by the warranty against particular average, from recovering the amount of the ransom paid.

1. The goods were not landed in safety *at Leghorn*. They were landed at the Lazaretto, which is no part of the city of Leghorn. The landing contemplated by the policy was at the *city*—the place where the goods were to find a market; and not merely a landing at the port. The voyage as to the ship might terminate at the *port*, but the goods were to go to the *city*, and be landed in safety. After having performed quarantine at the Lazaretto, they were to be re-shipped into lighters and carried to the city.

But if the landing at the Lazaretto be a landing at Leghorn, yet they were not landed *in safety* within the meaning of the policy. It is natural to suppose that the parties meant such a landing as would put the cargo into the possession and under the control of the consignee. But while it was at the Lazaretto, it was subject to the orders of the *master*, not of the consignee. It was still liable for freight, and although it is said to be part of the usage of the trade, that the freight is *earned* by the delivery at the Lazaretto, yet it is not payable until the termination of the quarantine. The Lazaretto is a mere substitute for the ship as a place in which to perform the quarantine. If it had remained on board the vessel, it would unquestionably have been at the risk of the underwriters. The landing was for their benefit inasmuch as the goods were safer on shore than in the ship.

The seizure was a detention of princes, and until the goods were ransomed, they were lost. 1, *Marshall*, 264, 176, *Waples v. Eames*, *id.* 269, 181, *Pelly v. Roy. Ex. Assur.*

2. Notwithstanding the warranty against particular

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average, the Plaintiff may recover upon the clause of the policy authorizing him to labor and travel for the preservation of the property, to the expense whereof the underwriters promise to contribute according to the rate of the sum insured. The ransom was an expense incurred to save the residue and prevent a total loss, for which the underwriters would have been liable.

JONES *and* PINKNEY, *contra.*

1. The voyage was ended by the landing of the goods at the Lazaretto. The policy is satisfied if they are landed at the *port* of Leghorn. When the name of a place is used in a policy it means the *port*, although Leghorn is a city, yet the port is also called Leghorn. When a place is named as the *terminus* of the voyage, it means the usual place to which ships come to unlade. It does not always mean the *caput portus*. It sometimes means the house of general receipt. Doubtful expressions are to be construed in favor of the underwriters. 1, *Bur.* 348, 349, *Tierney v. Etherington*, cited by lord Mansfield in the *Bank-Saul* case of *Pelly v. Roy. Ex. Assur.* 1, *Marshall*, 250, 251. *Hargrave's Law Tracts*, 46. *Hales Treatise de portubus Maris*, *ch.* 2. *p*, 56. The termination of the voyage, in fact and in law, is the landing of the goods at the usual place of landing, at the ultimate port of destination according to the usage of that trade. The usage of the trade is all important. The parties are bound to know it. It forms part of their contract. It may control and modify a warranty, and illustrate the termination of the voyage. The case states that the freight was earned by delivery at the Lazaretto—the duties had accrued to the Etrurian government—the transportation from thence to the city would have been at the risk and expense of the consignee or the owner. It was also a place where the goods might be sold by samples: All these circumstances show that the voyage was ended. The general rule is that if the insured undertakes to transport the goods, the underwriters are discharged. 1, *Marshall*, 165, 249, *Sparrow v. Caruthers. id.* 166, 253, *Rucker v. Lond. Assur. id.* 167, 254, *Hurry v. Roy. Ex. Assur.* The lien for the freight depends either upon the agreement of the parties on the municipal law of the place; it does not affect the question respecting the

termination of the voyage. In the cases of *Tierney v. Etherington and Pelly v. Roy. Ex. Assur.* the voyage confessedly was not terminated. The government of Leghorn receives the cargo at the Lazaretto as the agent of the owner or consignee and holds it for his benfit; it is entered on the books of the Lazaretto in the name of the ship, the master and the consignee, if known.

The policy was never construed to undertake that the consignee should have the unlimited control over the cargo after it was landed. But in this case it was under his control; not absolute, but modified by the municipal government of the place. The government had a right so to modify it. Thus in London, some goods must be deposited in the kings warehouse. So also in France, the emperor took it into his head to turn merchant and monopolize all the tobacco, and ordered it to be stored in his warehouses. In all countries the power of the consignee is in a certain degree modified. He had a power to take samples and sell by them.

It is said also that the goods were to be landed at the place of market. But if the place of market means the place where the goods may be sold, and where they are under the control of the consignee—the Lazaretto was that place. The Lazaretto was an appendage to Leghorn, as the *Piræum* was to Athens. Suppose the voyage had been from Carthage to Athens, landing at the *Piræum* would have terminated the voyage. So would a voyage from the West Indies to London terminate at the West India dock; yet something must be previously done by a consignee at the dock before he can have the complete control over the goods in the wharehouses of the dock company. So in the port of Baltimore, some goods must be delivered at the Lazaretto. And if a cargo should be delivered at Fell's Point (which is out of the city) under a policy on a voyage to Baltimore, the policy would be discharged. The cargo would have been brought to its market.

In the case of *Waples v. Eames*, the ship was not 24 hours moored in good safety. There was no opportunity to unlade. But here the goods were actually un-

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laden. In the *Bank Saul* case there was no question whether the voyage was ended. The ship was *in itinere*. The only question was whether, by the usage of the trade, the goods might be unladen for safe keeping while the vessel was repairing.

2. It was only a partial loss, which is excepted from the policy by the *manuscript* warranty against *particular average;* which means partial loss.

Although it would have been a total loss if abandonment had been offered while the goods were detained, yet as no such offer was made, it is now only a partial loss.

Those parts of the policy which are in *manuscript* are to be particularly regarded, as they control the printed form. 1, *Marshall*, 229, 305. *Park*, 4, 5, 60. 1, *East*, 130.

Ransom is only a *partial loss*. It was never considered as coming under the clause of laboring and travelling for the interest of all concerned. If it can come under that clause, then that clause is so far repealed by the express manuscript warranty, that the underwriters shall not be liable for a partial loss. If the French general had taken a part of the goods, there could have been no question that the underwriters would not have been liable—the *ransom* represents the part which might have been so taken. The clause respecting the expenses of labor and travel was first introduced in 1741, to remove a doubt whether the insured could so labor and travel without losing his right to abandon; but he is not bound to labor and travel, nor to ransom. 1, *Marshall*, 234, 488. 3, *Bur.* 1734. *Doug.* 610.

But if the underwriters are liable under that clause of the policy, they are only liable in the proportion which the loss bears to the amount saved.

HARPER, *in reply*.

1. The first point depends upon the usage of the trade. We say that the usage merely substitutes the Lazaretto for the ship; like the cases of the store ship at Gibral-

ter, and the *Bank Saul* at Canton. The principle of all these cases is *substitution*. The goods were not in the power of the consignee. He could only make an executory contract. He had no more power over the goods than if they had been upon the ocean.

The lien for the freight continues until the end of the quarantine, when it is to be paid, and not before, because the master has not until then done all that the contract requires.

2. It is said that the exception of partial loss operates upon every part of the policy; not merely upon its general provisions, but upon every particular provision, however contradictory it may be to that exception. But the two clauses, viz: the engagement to pay for labor and travel, and the warranty against partial losses, may stand together. The latter means warranted free from all partial losses *except such as arise from labor and travel* for the preservation of the goods. The blanks in the printed form of the clause respecting labor and travel were filled in manuscript, as well as the warranty against particular average, and therefore are to be equally regarded. That circumstance also shows that the parties intended that both clauses should stand, and have effect. The ransom was as much the means of saving the underwriters from a total loss, as if it had been strictly labor and travel.

Feb. 19th....MARSHALL, *Ch. J.* after stating the case, delivered the opinion of the Court as follows:

The Plaintiff in error contends,

1st. That the placing of the goods in the Lazaretto was not "a landing in safety at Leghorn," and a termination of the voyage.

2d. If the loss happened during the continuance of the risk, the Plaintiff is not prevented from recovering, by the warranty in the policy against particular average.

In support of his first point he contends that "Leghorn," in the policy, means the city and not the port of Leghorn.

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2d. That the Lazaretto being substituted for the ship for the greater safety of the goods, their situation, as it respects all parties, while performing quarantine in the Lazaretto, is precisely the same as if performing quarantine in the ship. This argument is supposed to be much strengthened by the facts, that freight cannot be demanded until quarantine is performed, and that the lien for the freight continues after the landing of the goods.

3d. That a landing in safety must be such a landing as places the goods at the disposal of the owner or consignee.

However true it may be in general that when we speak of Leghorn, we speak of the city which bears that name, it does not follow that the same meaning is attached to the word when used in a policy. The insurance is "at and from Baltimore to Leghorn." Now if, as is admitted, Baltimore means the port of Baltimore, it would seem not unreasonable to suppose that, in the same instrument, Leghorn means the port of Leghorn—the place which is the ultimate destination of the vessel on board which the goods are laden. The voyage is understood to be terminated when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours.

But it will be conceded that the termination of the voyage as to the ship, does not necessarily terminate the risk on the goods. This risk may continue when the voyage as to the ship is ended. Its duration depends on the intention of the parties, and this intention must be found in their contract.

This brings us to consider the argument that the goods while performing quarantine in the Lazaretto remain at the risk of the insurer in like manner as if performing quarantine in the ship.

The words of the policy being "beginning the adventure on the said lawful goods and merchandizes from and immediately following the lading thereof on board of said vessel at Baltimore aforesaid, and so shall continue and indure until the said goods and merchandizes shall be safely landed at Leghorn aforesaid." The risk continues until the goods be safely landed, although the

voyage as to the ship, might be terminated previous to their landing.

In ordinary cases, where the government does not interfere between the parties, this risk would continue until the goods should be landed in safety at the usual place, and at the disposal of the consignee. If it were usual to receive goods at the Lazaretto or at any other place on the shore of the port, it would be the duty of the owner or consignee to receive them there, and a landing at such place, it is admitted, would be a landing at Leghorn.

If on the other hand the goods while performing quarantine remained on board the ship, and could not be landed, it is not to be doubted that they would remain at the risk of the insurer. How then, it is asked, can the substitution of the Lazaretto for the ship alter this risk? A substitution made, not by the act of the parties, but of the government of the country? A substitution which does not alter the rights of the parties since it leaves the lien of the master for his freight unimpaired, and gives no power over the goods to the owner or consignee? A substitution beneficial to the insurer since it diminishes the risk on the goods?

Whatever might be the effect of this reasoning if the establishment of the Lazaretto, and the laws of quarantine had been of so recent a date, as not to have been in the contemplation of the parties to the contract, as to which the court gives no opinion, this cause may well be decided upon the usage found in this case, a usage of ancient date and of general notoriety. It existed and was known to exist when this contract was formed. When the parties stipulated that the adventure should continue till the goods were landed in safety at Leghorn, they knew that the place of landing was the Lazaretto, and that the landing would be made under the direction and control of the local authority. This then must be considered as the landing contemplated in the policy. It is the landing which terminates the risk. Had the parties intended to continue the risk during the continuance of the goods in the Lazaretto, they would have inserted, in the policy, words manifesting that intention. Instead of terminating the adventure on the landing, a

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fact which they knew must take place at the Lazaretto thirty days before the goods could be delivered to the owner or consignee, they would have continued it, till the goods should be landed in safety and should perform their quarantine.

The Court is of opinion that under this policy the goods in the Lazaretto were not at the risk of the underwriters and consequently that there is no error in the judgment of the Circuit Court.

It is affirmed with costs.

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This case differs from that against the Marine Insurance Company of Baltimore only in one particular. A part of the cargo remained on board the ship until the arrival of the French troops when the departure of the vessel was prohibited by the general and the ransom made.

This circumstance does not, in the opinion of the Court, vary the case; because, omitting all other considerations, the loss, within the risk, being on only a part of the cargo, is a partial loss, and is affected by the warranty against particular average loss.

This judgment is also to be affirmed with costs.

1814.

Feb. 11th.

RICHARDS AND OTHERS,

ASSIGNEES OF M'KEAN, A BANKRUPT,

v.

THE MARYLAND INSURANCE COMPANY.

Absent....WASHINGTON, *J.*

Upon the death of an assignee under

ERROR to the Circuit Court for the district of Maryland, in an action of covenant on a policy of in-

surance under seal. The Defendants pleaded the Maryland statute of limitation of 12 years, 1715. *ch.* 23, § 6, which enacts, "that no specialty whatsoever, shall "be good and pleadable, or admitted in evidence "against any person or persons of this province, after "the principal debtor and creditor have been both dead "12 years, *or the debt or thing in action above 12 years "standing*," with a saving of 5 years in cases of infancy, &c.

The replication to this plea stated in substance the following facts, that the cause of action accrued on the 1st of May, 1797. That *M'Kean* was declared a bankrupt, and on the 19th of March, 1801, his estate was duly assigned to *Thomas Allibone*, who, on the 6th of October, 1806, instituted a suit on the policy and died on the 1st of August, 1809, whereby the suit was abated. That on the 11th of January, 1810, the Plaintiffs were, by the commissioners, appointed assignees in pursuance of the choice of the creditors regularly convened for that purpose, and brought the present action at the next term after the death of Allibone, the former assignee. To this replication there was a general demurrer.

The judgment of the Court below, upon the demurrer, was in favor of the Defendants; and the Plaintiffs brought their writ of error.

HARPER, *for the Plaintiffs in error*, made four points.

1. That an assignee, under the commission of bankruptcy, had no *interest* in the effects of the bankrupt which could vest in his executors or administrators, but was a mere trustee or agent of the commissioners.

2. That the commissioners had power, upon the death of an assignee, to appoint another in his stead, and so *toties quoties*.

3. That under the equity of the statute of limitations the Plaintiffs had a right to bring a fresh suit upon the abatement of the first.

4. That there was a good continuance of the suit by *Journey's accounts*.

the bankrupt law of the U. States, the right of action for a debt due to the bankrupt, vested in the executor of the assignee. If an executor do not cause himself to be made party to a suit brought in the life time, and in the name, of the testator, and pending at his death, it is to be considered as a voluntary abandonment of the action, so as to exclude the executor from the equity of the exceptions to the statute of limitations. Quere, whether the commissioners of bankrupt had a right to appoint a second assignee in case of the death of the first? At common law, no action could be renewed by Journey's accounts, in a case of voluntary abandonment.

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1. The bankrupt law gave no *estate* to the assignee. He had no interest in the effects of the bankrupt; the object of the law was merely to appoint a curator of the estate, with an authority like that of an administrator. It was a mere personal agency which terminated by the death of the assignee. It was the intention of the law that this agent should have the confidence of the creditors; but that intention would be defeated if the executor or administrator of the assignee should become the agent. *Vide Bankrupt law of the United States, vol. 5, p. 50, § 6, 7 and 8.*

2. The commissioners, under the equity of the 6th and 8th sections, had power to appoint a new assignee or assignees in case of the death of the assignee for the time being. Their power was like that of the ordinary in granting letters of administration. No express authority is given to the ordinary to grant letters *de bonis non*, yet his authority to do it was never disputed. The intention of the bankrupt law was that there should always be an assignee until the estate should be settled. The general power to appoint, implies an authority to keep the office always full. The Plaintiffs, therefore, had power to maintain this action.

3. The act of limitations does not apply to this case. 2 *Salk.* 421. *Cary and ux. v. Stephenson.* The principle of that case was that the Plaintiffs had done all in their power, and, therefore, the statute of limitation was not a bar. To make the statute apply there must be negligence on the part of the Plaintiff, and injury to the Defendant by the delay. If an administrator commence the action within a year after the granting of letters of administration, the statute is no bar, unless it began to run in the life of the intestate. So in the case of an executor of an executor. *Buller N. P.* 150. *Esp. N. P.* 150. These cases all depend on the same general principle—the equity of the statute. If there be no negligence on the part of the Plaintiff and no injury to the Defendant, the case is within that equity.

4. This new action is a good continuation of the old suit by *Journey's accounts.* 6 *Co.* 10, *Spencer's case.* A new action by *Journey's accounts* may be had where the former action abates by the fault of the clerk, &c. but,

not if it be abated by his own default. The doctrine applies as well to personal as to real actions. 1 *Ld. Ray.* 283, *Elstob v. Thorowgood.* The principle of that case is that where the second Plaintiff derives his authority from the same scource as the first, he may have the action by *Journey's account.*

PINKNEY, *contra.*

The argument divides itself into two parts.

1. The construction of the act of congress.

2. The effect of the act of limitations.

1. Under the bankrupt law the commissioners had no power to appoint a new assignee in case of the death of the first assignee. Their power in this respect was limited to the case of a removal of the assignee by the creditors. Much is said about the equity of the statute, but this Court is authorized *jus dicere, non jus dare.* The 6th section provides for the appointment of an assignee. The 7th authorizes the commissioners to appoint a temporary assignee without the consent of the creditors, and the 8th section provides for the removal of an assignee, and the appointment of another in his place. If the Court can extend the equity of the statute to the case of the death of an assignee, it must be by a very liberal construction.

By the 18th section the estate and effects of the bankrupt are to be conveyed to the assignee, *his heirs, executors, administrators and assigns forever.* The 50th section conveys the same idea. The estate descends to the heir of the assignee, clothed with the trust, and he has all the rights and is subject to all the responsibilities and duties of the original assignee.

But if the Court can, by equity, extend the power of the commissioners to the appointment of a new assignee in case of death, then, under the 9th section of the act, the new assignee might have been substituted for the old, and the action would not have abated by the death, but might have been prosecuted to judgment by the new assignee. So that if the suit was abated, it was through

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his negligence, or voluntary act; and no Plaintiff, who is in default, can have the benefit of the equity of the statute by Journey's accounts.

2. As to the Maryland statute of limitations. It differs from the English statute of 21 *Jac.* which contains no limitation of actions upon specialities, judgments or recognizances. The same rule of equitable construction, therefore, cannot apply to both. But even if the same rule of construction could be applied to the Maryland statute, yet it does not contain the same clause upon which the equity arises in England.

The object of the statute was to prevent injury to Defendants by the loss of evidence. If the statute once begins to run nothing will stop its course but an *effectual* suit. If a promise be made to a *feme sole*, and the day after the cause of action accrues, she marry, the statute continues to run notwithstanding the coverture, so in case of *non compos, absence, &c.* 4 *Bac. Ab.* 479, *note.* 1 *Bac. Ab.* 413.

But it is only the equity of the 4*th section* of the *English statute* that could have aided the Plaintiffs. That section allows a new action to be brought within a year, in three cases. 1. Where judgment has been reversed by writ of error. 2. Where judgment has been arrested; and, 3. Where an outlawry has been reversed. 4 *Bac. Ab.* 471, *Gwillim's edition*, § 4. The Courts have said that *abatement* is within the same reason, but they have not said that other representatives than those mentioned in the 4th section may bring a new action, (except in the case in lord Raymond, which has been over-ruled in that respect. 1 *Ld. Ray.* 284.)

The Maryland statute does not contain a section similar to the 4th section of the 21st James.

HARPER. But that section of the English statute has been always in use in Maryland in that respect, and is in daily practice in their Courts; and, therefore, and by force of the bill of rights and constitution of Maryland, has been adopted as part of the law of the land.

PINKNEY. The statute of James is not in force in Maryland in respect to those cases for which the statute of Maryland provides. This statute professes to provide a limitation for all actions, and to enumerate all cases in which exceptions should be made. With the English statute before them, and while exercised in selecting such parts of it as they thought proper, the legislature cannot be presumed to have been so negligent as to omit the 4th section if they intended to adopt it.

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But if it be in force in Maryland, this Court will not push the equity of it farther than has been done in the Courts in England. They have never permitted such a representative, as these Plaintiffs are, to bring a new action, nor any one to bring a new action where the benefit of the former one has been lost by negligence or voluntary abandonment; which we say was the case here, for the action might certainly have been continued and maintained by either the executor of Allibone, or by the new assignees. In the case cited from 2 *Salk.* 421, *Cary v. Stephenson*, the cause of action arose after the death of the intestate and before the letters of administration were granted. For if the statute had begun to run in the life of the intestate, it would have continued to run although no administration had been granted.

The next case is *Carver v. James*, or *Carver v. James*, or *Karver v. James*, as it is differently called in several books. *Buller, N. P.* 150. *Esp. N. P.* 150. *Wille's Rep.* 255. In that case the action was brought by the executor, and the equity of the 4th section of 21 *Jac.* extends only to the party himself, his heirs, *executors and administrators*, and not to any other representative. The case cited from 1 *Ld. Ray.* 283, supports the same doctrine. Both Plaintiffs were executors of the original creditor. The Court decided the case upon the doctrine of *Journey's accounts* and the equity of the 4th section of the statute of James. The case put by the Court, by way of illustration, is precisely in point. If the first Plaintiff had been *administrator* (instead of executor) *durante minoritate*, the executor, when of age, could not have continued the suit by *Journey's accounts*, nor would he have been aided by the equity of the statute, because he was not the legal representative of the

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former Plaintiff. There is no case in which an assignee has been decided to be within the equity of that section of the statute. Although both assignees may derive their authority from the same source, yet the one is not the legal representative of the other. The opinion in the case of *Elstob v. Thorowgood (Ld. Raymond, 283)* is expressly retracted, in the case of *Kinsey v. Heyward*, 1 *Ld. Ray.* 432, where the same Court say "that in no "case can a writ of Journey's accounts be, but by the "same Plaintiffs, or some of them, who were Plaintiffs "in the former writ; and that to say that the general "executor, and the executor *durante minoritate*, were "as one person in the office, is to strain the point too "far; for it must be the same Plaintiff, not only by re-"presentation, but by name; for the second writ is a "continuance of the first, which cannot be but by the "same person, not in representation only, or in respect "of their office, but strictly and truly the same person."

JONES, *same side.*

Even if the doctrine of *Journey's accounts* could apply, the Plaintiffs were too late. In *Journey's accounts* the writ is said to be granted *per dietas computatas*, which originally meant as many days journies as the Plaintiff was distant from the Court of chancery, where he was obliged to go to get a new writ, accounting 20 miles for a day's journey, and it was originally necessary to show the number of days in the replication that by computation it might appear that he was within the time allowed. This was afterwards settled by a general rule to be 30 days. In this replication the Plaintiff has replied simply the facts, and says nothing of the *dietas computatas*. The new writ, by Journey's accounts, operates a continuance of the old suit, and in the judgment the Plaintiff recovers the costs of both writs, and, therefore, it must be brought by the same Plaintiff. 8 *Co.* 10, *Spencer's case.* 2 *Inst.* 288. 2 *Com. Dig.* 433. *Tit. costs.* In none of the cases decided upon the equity of the statute of James, has the Plaintiff prevailed upon appeal. They are little better than *obiter dicta.*

HARPER, *in reply.*

The opposite counsel almost admit our construction

of the bankrupt law. The authority of the assignee is like that of an administrator. The power of the commissioners is like that of the ordinary.

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Although the writ was abated, yet the Plaintiffs might renew the suit. They were not in default by not continuing the old writ, for if they might have continued it, they were not obliged so to do. Thus in Maryland an executor may be made a party in the place of his testator; but if he does not come in and the suit is thereby abated, he may bring a new suit. The right of the Plaintiffs to continue the old suit, under the 9th section of the bankrupt law, was doubtful. They preferred a safe, plain, clear, undeniable remedy. Their having done so ought not to exclude them from the equity of the statute of limitations.

It is well known to every lawyer in Maryland, that the 4th section of the statute of James had been used and practised in the Courts of that state, and it has, therefore, become the law of the land by force of the bill of rights.

The case of *Kinsey v. Heyward* was not reversed on its merits, the doctrine of the Court of common pleas, that the Plaintiff was within the equity of the 4th section of the statute of James, was not denied by the king's bench. Nor was the case of *Carver v. James* reversed upon the merits. The doctrine, therefore, was in effect affirmed by implication; because they would not have assigned other causes of reversal, if the principle of the case itself was erroneous.

February 25th....JOHNSON, *J.* delivered the opinion of the Court as follows:

This is an action of covenant brought on a policy of insurance under seal. The facts as made out in the pleadings are these: The cause of action accrued on the 1st May, 1797. M'Kean was declared a bankrupt, and on the 19th March, 1801, his estate was assigned to Thomas Allibone. On the sixth of October, 1806, the assignee instituted a suit on this policy and died on the 1st of August, 1809.

On the 11th of January, 1810, the Plaintiffs were

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appointed assignees in pursuance of the choice of the creditors regularly convened for that purpose, and brought the present action to the term next after the death of the assignee.

The plea is the statute of limitations. To this is filed a special replication, setting forth the above facts with a view to sustain an exception from the operation of the statute. The case comes up on a demurrer to the replication, and for the Defendant there were two points made at bar. 1st. That the action is not maintainable at all by the present Plaintiffs, because the bankrupt act makes no provision for the appointment of a new assignee upon the demise of the first. 2d, That the right of action vests in his personal representative and could be maintained by him—that the abatement by the death of the first assignee, was a voluntary abandonment of the suit, and put the case of the Plaintiffs out of the reason of the exceptions from the operation of the statute. In support of the action it was contended, that the former suit abated by the death of the first assignee—that the right did not vest in his executors, because it was a mere trust or agency—that the right of substituting the new assignees in the action is secured only in the case of removal by the creditors—that this case is without the statute of limitations upon an equitable construction of that statute—and lastly, that this action is a good continuance of the former, by Journey's account—

We are of opinion that the plea of the statute of limitations must be sustained. On the first point made by the Defendant, the Court would be understood to give no opinion. Being satisfied that the Plaintiff has not brought himself within any one of the exceptions which have been admitted to the statute of limitations, and feeling no inclination to multiply those exceptions, they dispose of the case upon the second ground alone. The cases which, though literally within the words of the statute, have been held to be without its spirit, are those only in which circumstances intervened, which rendered it impossible or inconsistent with known and established principles, that a cause of action could be revived by the renewal of the contract, or enforced by a suit at law within the time prescribed. The object

of the law is to secure the individual from the machinations of dishonesty, when attempted under the advantages attendant upon lapse of time, loss of papers, and death of witnesses. But when cases present themselves in which no laches can be imputed to the Plaintiffs, but great injustice would be done by applying to such cases the effect of the statute, the conclusion of reason and of the law is that such cases were not in the mind of the legislature when enacting that law. Such are the cases of a want of parties, Plaintiff or Defendant, whereby a temporary suspension of legal remedy takes place. But in no case of a voluntary abandonment of an action, has an exception to the statute of limitations been supported. And such we are of opinion is the case before us. Whether it was or was not a case in which the bankrupt law authorizes the appointment of the present assignee we deem immaterial. The case is certainly not within the express letter of the statute, and it is only under its equitable, and perhaps its proper construction, that the appointment of the new assignees (the present Plaintiffs) can be supported. But the same equity which would support this appointment, would support the substitution of the new assignees for the former in the existing action. We are, however, of opinion, that the first assignee was not a mere naked agent or attorney for the creditors. The words of the bankrupt act. sect. 13, are that the debts assigned to him shall be vested in him, as if they had been contracts made with himself originally. Now one necessary incident to such a contract would be, that the right of action would vest in his personal representative, and the act of Congress saves the suit from abatement by authorizing the substitution of the executor or administrators instead of the deceased Plaintiff. The same answer applies to the antiquated doctrine of continuance by Journey's account. The fact is, that the mode of continuing a suit in the name of the executor or administrator provided for by statute is a complete substitute for the continuance by Journey's account. But even at common law, such a continuance or connexion of suit was allowed in no case of voluntary abandonment, and if the benefit of it was intended to be asserted, it was necessary to claim it in the form of renewing the action.

Judgment affirmed with costs.

1814. CROWELL AND OTHERS v. M'FADON.

Feb. 16th.

Absent....WASHINGTON, *J.*

Under the 11th sec. of the Embargo act of 25th April, 1808, the collector was justified in detaining a vessel by his honest opinion that there was an intention to violate or evade the provisions of the Embargo laws. It was not necessary for him to show that his suspicion was reasonable.

ERROR to the Supreme Judicial Court of the Commonwealth of Massachusetts.

The case, as stated by DUVALL, *J.* in delivering the opinion of the Court, was as follows:

An action of trover for 650 barrels of flour, of the cargo of the schooner Union, was brought by John M'Fadon against Joseph Otis and the Appellants, in the Court of Common Pleas for Suffolk county, in the Commonwealth of Massachusetts, where a trial was had and judgment rendered in favor of the Defendants. From this decision there was an appeal to the Supreme Judicial Court of that state, in which the cause was again tried and a verdict and judgment rendered for the Plaintiff for $3,716 30 and costs. Joseph Otis died whilst the suit was depending in the Supreme Judicial Court.

The following are the principal facts appearing on the record in this case: The schooner Union, Benjamin Hawes, commander, with a cargo of 650 barrels of flour and five tons of logwood shipped by John M'Fadon, of Baltimore, was cleared at that port for Machias, in Massachusetts, late in the month of April, in the year 1808. She had originally cleared for Passamaquoddy, on the 26th of April, before the collector had received notice of the act of the 25th of the same month which authorised him to detain the vessel: the destination was changed to Machias, and a clearance obtained accordingly. But the original destination of the flour on board for Eastport, remained on the face of the manifest. The flour was shipped for account and risk of Josiah Dana, of Machias, and in his absence Jonathan Bartlett, of Eastport, or his assigns. The Union sailed from Baltimore the last of April and meeting with head winds, the commander put into Hyanas, in the district of Barnstable. She was soon afterwards boarded by Joseph Crowell, one of the inspectors of the revenue in that district, who, on inspecting her papers, thought proper to

submit them to the examination of Joseph Otis the collector. The collector, upon a consideration of the circumstances before stated, was of opinion that it was the intention of the concerned to violate or evade the provisions of the embargo laws, and therefore detained the vessel by virtue of the authority vested in him by the 6th and 11th sections of the act of the 25th of April, 1808, *vol. 9, p. 68*, until the decision of the president of the United States could be had thereon. The president, after due enquiry, approved and confirmed the conduct of the collector. The vessel remained in this situation until the 25th of July, when she was taken to Gage's wharf by Joseph Hawes, inspector of the port, and her cargo was landed and stored, with the assent of the agent of the owners, and the vessel discharged. On the 4th of October following the collector offered to deliver the flour to the agent on payment of the expense of storing.

The collector detained the Union under the 6th and 11th sections of the act of the 25th of April, 1808. The 6th section provides "that no ship or vessel having any cargo whatever on board, shall, during the continuance of the act laying an embargo on all ships and vessels in the ports and harbors of the United States, be allowed to depart from any port of the United States for any other port or district of the United States adjacent to the territories, colonies or provinces of a foreign nation; nor shall any clearance be furnished to any ship or vessel bound as aforesaid without special permission of the president of the United States." The 11th section provides that the collectors of the customs be and they are respectively authorised to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever in their opinion the intention is to violate or evade any of the provisions of the acts laying an embargo until the decision of the president of the United States be had thereupon.

With this evidence the cause came on to be heard in the Supreme Judicial Court of Massachusetts, and at the trial the judge charged and instructed the jury that, under the circumstances proved by the Defendant, neither the said collector or any person by his order, by virtue of the act aforesaid, had any right to intermeddle with or unlade the cargo of the said schooner, and that

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such unlading was an unlawful act and a conversion of the cargo by the Defendants; and with this direction the jury found a verdict for the Plaintiff to the amount before-mentioned. To this opinion an exception was taken and the cause was removed to this court by writ of error in pursuance of the 25th section of the act to establish the Judicial Courts of the United States.

PINKNEY, *(late attorney general of the United States,) for the Plaintiff in Error,*

Contended, that as the landing and storing the cargo was by consent of the agent of the owner, the only question was, whether the collector was justified, in detaining the vessel, by his honest suspicion that the intention was to violate or evade the provisions of the embargo laws.

Upon this point he insisted that it was not incumbent on the collector to show that he had reasonable grounds of suspicion. It was sufficient if he satisfied the jury that, in his honest opinion, there was such an intention.

HARPER, *contra,*

Contended, that the question was not whether the *detention* was justifiable, but whether the *unlading* was justifiable. If the landing was by the consent of the agent of the owner, it was a consent forced upon him by the detention of the vessel.

But congress could not mean to subject the vessel to the arbitrary opinion of the collector. The detention was not lawful unless the circumstances justified the suspicion. The collector must at least shew probable cause. The facts of the case did not authorise the suspicion.

PINKNEY, *in reply.*

The question is still the same. As the unlading was with the assent of the agent of the owner, it was a lawful act if the detention was lawful. The law did not mean to make the collector responsible for the *sound* exercise of his discretion. He was to have no guide but

his own honest opinion. It is not like the case of capture as prize of war, where the officer acts at his peril, and must exercise a sound discretion and must have *reasonable* grounds of suspicion. But here it is put upon the *opinion* of the collector, and he is bound to act upon that opinion. If he fails to do so, he is liable for a misdemeanor in his office. If he honestly errs in his suspicion he is excused. Whether it be his honest opinion is a matter for the decision of the jury.

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This cause was argued at last term by the *Attorney General & Jones* for the Plaintiffs in Error, and by *Amory & P. B. Key* for the Defendants in Error.

PINKNEY, *attorney general,*

Suggested a doubt whether an action for damages for a seizure on navigable waters was not as much a cause of admiralty and maritime jurisdiction as if the proceedings were *in rem.*

AMORY & KEY,

Contended, that the 11th section of the act of 25th April, 1808, only gave authority to the *collector of the district who was to grant the clearance,* to detain the vessel, and that the collector of another district had no right to stop a vessel passing through an intermediate district. The law gave no right to *seize,* but merely to *detain,* which shows that the authority is given only to the collector within whose official control the vessel is. The collector to whom application is to be made for a clearance is the only person to whom the discretion is entrusted. He has the best means of information, and if suspicion should be excited, it is there only that the owner can furnish the means of removing it. The opposite construction of the law would give to collectors at the mouths of our bays the whole control of our commerce, and would subject it to much vexation. The whole trade of the Chesapeake would be subject to the control of the collector of Norfolk.

JONES, *in reply,*

Contended, that the law authorised any collector of

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any district to stop and detain any vessel which might be passing through his district, if he really suspected her of an intention to violate the provisions of the embargo laws.

Feb. 28th....DUVALL, *J.** after stating the facts of the case, delivered the opinion of the Court as follows:

"This Court is unanimously of opinion that the direction of the judge of the Supreme Judicial Court of Massachusetts was erroneous. The law of congress under which the collector acted is clear and explicit. The collector was bound by law to seize and detain the Union, on her arrival in his district, if, in his opinion, it was the intention to violate or evade any of the provisions of the embargo laws, and his conduct was approved and confirmed by the president. The landing and storing the cargo, whether to preserve it from injury or to secure it from ruin, (which, in this case, was done with the consent of the agent of the owner,) was a necessary consequence of the detention. The law places a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly exercises it, as he must do in the execution of his duty, he cannot be punished for it.

The judgment of the Court below *is reversed with costs.*

1814.

BEATTY'S ADMINISTRATORS

BURNES'S ADMINISTRATORS.

Absent.... WASHINGTON, *J.*

The Maryland statute of limi-

ERROR to the Circuit Court for the district of Columbia, sitting at Washington.

* JUDGE LIVINGSTON was absent when this opinion was delivered. JUDGE STORY gave no opinion, having some impression that he was, at a former period, retained as counsel in the cause, although he did not remember argu-

The case as stated by STORY, *J.* in delivering the opinion of the Court, was as follows:

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This is an action for money had and received brought by the Plaintiffs as administrators of Charles Beatty, deceased, against the Defendant as administrator of David Burnes, deceased. The declaration alledges the promise to have been made in the life time of the respective intestates. The Defendant has pleaded the general issue, and the statute of limitations of Maryland.

tations of three years is a good bar to an action of assumpsit for money had and received brought to try a title to lands in the city of Washington, under the 5th sect: of the act of Maryland, of Nov. 1791, ch 45.

Upon the trial in the Circuit Court for the district of Columbia, the Plaintiffs sought to support their action under the 5th section of the statute of Maryland, of *Nov.* 1791, *ch.* 45, concerning the territory of Columbia, and the city of Washington, that section is as follows:

Quere, whether, by the Maryland act of cession of the district of Columbia to the U. States, the state conveyed to the United States the vacant and unappropriated lands in the district?

"*And be it enacted*, That all the squares, lots, pieces "and parcels of land within the said city, which have "been or shall be appropriated for the use of the Uni- "ted States, and also the streets, shall remain, and be "for the use of the United States; and all the lots and "parcels which have been or shall be sold to raise mo- "ney as a donation as aforesaid, shall remain and be to "the purchasers according to the terms and conditions "of their respective purchases."

"And purchases and leases from private persons "claiming to be proprietors and having, or those under "whom they claim having, been in possession of the "lands purchased or leased, in their own right, five "whole years next before the passing of this act, shall "be good and effectual for the estate, and on the terms "and conditions of such purchases and leases respec- "tively, without impeachment, and against any contra- "ry title now existing; but if any person hath made a "conveyance, or shall make a conveyance or lease, of "any lands within the limits of the said city, not hav- "ing right and title to do so, the person, who might be "entitled to recover the land under a contrary title "now existing, may, either by way of ejectment against "the tenant, or in an action for money had and receiv- "ed for his use against the bargainor or lessor, his "heirs, executors, administrators or devisees, as the "case may require, recover all money received by him

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"for the squares, pieces or parcels appropriated for "the use of the United States, as well as for lots or "parcels sold, and rents received by the person not "having title as aforesaid, with interest from the time "of the receipt; and on such recovery in ejectment "where the land is in lease, the tenant shall thereafter "hold under, and pay the rent reserved, to the person "making title to and recovering the land, but the pos- "session, *bona fide* acquired, in none of the said cases "shall be changed."

The Plaintiffs offered evidence, that on the 16th of April, 1792, Charles Beatty, the intestate returned into the land office for the Western Shore of Maryland, a certificate of survey dated on the 3d of April, 1792, and then paid the usual caution money for the land described in said certificate. On the 23d May, 1792, a caveat against the issuing of a patent for the lands on said certificate, was filed by David Burnes the intestate, which caveat was discontinued on the 23d of May, 1801, by virtue of a certain act of the state of Maryland. On the same day a patent issued from the land office to Charles Beatty for the land described in said certificate, which land is within the limits of the city of Washington, and was taken up by Beatty as a vacancy; but Beatty never had actual possession thereof, nor ever claimed to make division thereof with the city commissioners as an original proprietor pursuant to the statute of Maryland, 1791, ch. 45. In fact the same land had been held and claimed by David Burnes in his own right, for more than five years before the passing of the statute aforesaid, as included in the lines of a grant made as early as 1720. The Plaintiff offered evidence however that the land included in Beatty's patent, was without the lines of the land to which Burnes was, under his grant, really entitled, and that it was vacant land of the state of Maryland. The warrant, under which Beatty's patent was obtained, was, (before the location within the limits of Washington,) in part located upon and applied to other lands of the state of Maryland, not within the said city, or the county in which it was situate while belonging to Maryland. Burnes in his life time, and before the statute of 1791, ch. 45, made a conveyance of the land in controversy as an original proprietor to certain trustees for the purposes named in

that statute, and received of the city commissioners on account of parts of the same land appropriated to city purposes, the sum of $7,343 82, in various sums paid between October, 1792 and June, 1796; and also received $1,000 on account of other parts of said land which he sold and conveyed to individuals. Burnes died in May, 1799, and administration of his estate was granted in Prince George's county, in the same year to his widow, who died in January, 1807. In April, 1803, administration of his estate was granted to the Defendant, by the Orphan's Court of Washington county, in the district of Columbia. Beatty died sometime before May, 1805, and in that month administration of his estate was granted to the Plaintiffs. The present action is brought to recover the money so received by Burnes, upon the ground that it was the proceeds of the sale and disposition of land included in Beatty's patent. No demand or claim was ever made by Beatty on Burnes or his administrators, in his life time, for the same money, although both parties from the year 1791, until their respective deaths lived within the limits of the district of Columbia and within two miles of each other—nor did the Plaintiffs ever make any demand or claim upon the Defendant until February, 1810. Under these circumstances the Court below were of opinion that the Plaintiffs could not sustain the action, and upon that direction the jury found a verdict for the Defendant.

F. S. KEY, *for the Plaintiffs in error.*

Two questions arise in this case.

1st. Whether the Plaintiffs have a good cause of action under the patent to Beatty, if not barred by the statute of limitations: and

2d. Whether the statute of limitations is a bar to the action.

1. *As to the title of Beatty.* The *caveat* by Burnes was pending when Congress assumed the jurisdiction over the district of Columbia, which was on the 27th of February, 1801. The patent did not issue until the 23d May, 1801, but according to the law of Maryland,

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adopted as the law of that part of the district of Columbia in which the land lies, the title has relation to the return of the certificate of survey and payment of the purchase money to the state, if the original warrant of survey was general—but if it was a special warrant, the title relates to the date of the warrant. That is to say, in either case the title relates to that act of the party which appropriates and locates a particular tract of land under a warrant of survey. Beatty had two warrants. The first was a *special* warrant for 80 acres, and was dated the 22d of April, 1791, before the statute of Maryland of 1791, which ceded the territory of Columbia to the United States. The other warrant was for 6 arces, and was dated the 26th of March, 1792. A special warrant contains the name of the county in which it is to be executed, and also such a *location*, or description of the land intended to be surveyed, as the party directs It binds and secures the land, therein described, from the operation of other warrants, but it may be located any where else. A common warrant is for the number of acres required, "not formerly surveyed for, nor cultivated by any person," and is directed to any surveyor legally required. *Kilty's Landholder's Assistant*, 468.

Beatty's title relates (if not to the date of the first warrant) to the date of the return of the certificate of survey, and payment of the purchase money which was on the 16th of April, 1792.

Nothing but the form of a grant was necessary to complete the title before congress assumed the jurisdiction.

But it is contended, that the state of Maryland, by the 2d section of the act of *Nov.* 1791, *ch.* 45, ceded to the United States the land in question. That section is as follows: "Be it enacted," &c. "that all that part of "the said territory, called *Columbia*, which lies within "the limits of this state, shall be, and the same is here- "by acknowledged to be, forever ceded and relinquish- "ed to the congress and government of the United "States, in full and absolute right and exclusive juris- "diction, as well of soil, as of persons residing, or to "reside, thereon, pursuant to the tenor and effect of

"the eight section of the first article of the constitution "of government of the United States; provided that "nothing herein contained shall be so construed to vest "in the United States any right of property in the soil, "as to affect the rights of individuals therein, other- "wise than the same shall or may be transferred by "such individuals to the United States; and provided "also that the jurisdiction of the laws of this state, "over the persons and property of individuals residing "within the limits of the cession aforesaid, shall not "cease or determine until congress shall by law provide "for the government thereof, under their jurisdiction, "in manner provided by the article of the constitution "before recited."

This section did not transfer to the United States the vacant lands in the district of Columbia.

The 8th section of the 1st article of the constitution of the United States only gave congress power "to ex- "ercise exclusive legislation over such district (not ex- "ceeding 10 miles square) as may, by cession of par- "ticular states, and the acceptance of congress, become "the seat of the government of the United States." It did not authorize congress to accept the right of soil. The act of Maryland does *not* use words of conveyance of soil. They purport only a cession of jurisdiction. "*Ceded and relinquished*" are not words of grant. If they conveyed the soil they conveyed the *persons* also, for the same words are applied to them as to the soil. The legislature of Maryland were not competent to convey the soil, and it is doubtful whether they could transfer the jurisdiction. A title to vacant lands in this part of the district could only be attained by the regular proceedings in the land office of Maryland.

2. *As to the statute of limitations.*

The action of *assumpsit* given by the 5th section of the act of *Nov.* 1791, c. 45, is not to be considered as within the clause of the statute of limitations applicable to *assumpsits*. It purports to be a substitute for an action of ejectment, which is limited to 20, not to 3 years. It is evident that the object of the legislature was merely to protect the *possession*, not to take away the right.

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It is therefore natural to suppose that they intended that every person who could maintain ejectment should be entitled to maintain this action of *assumpsit* which was given in lieu of it, and only given that the judgment might affect the vendor and not the vendee; and that the Plaintiff should recover the *price* and not the land itself. The statute applied to conveyances and sales then already made as well as to conveyances and sales thereafter to be made. Suppose a sale made more than three years before the statute. The legislature did not surely intend to give a barred remedy in the place of an effective one. An action of debt given by statute for an escape is not barred by the statute of limitations.

But this is a case of *trust*, and trusts are not within the statute of limitations. Burnes received the money for the use of Beatty. In a case of trust, the statute does not begin to run till a demand is made. On this point there is a case of money received by an attorney for his client; and another of fees received for a judge by his clerk. We could not prevent Burnes from receiving the money. The law, therefore, makes him our trustee.

JONES, *contra*.

It is said that the legislature of Maryland was not competent to convey the soil, and that congress had no power to accept it.

Exclusive legislation comprehends all the rights over the territory and inhabitants which the state of Maryland had. If, therefore, the authority rested upon those words alone, the right to accept a cession of the soil would be implied. The constitution of the United States requires a *cession of territory* before congress could exercise *exclusive legislation*. The constitution of Maryland does not limit the mode in which the state shall grant its vacant lands. It is competent to do it by a legislative act as well as by the intervention of the land office. But the constitution of the United States is paramount to the constitution of Maryland as to the cession of the district of ten miles square. It authorizes particular states to cede as well as Congress to accept.

The 3d section of the act of Maryland, 1791, c. 45, has sufficient words to pass the right of soil as well as of jurisdiction. It declares "that all that part of the *territory*, called Columbia, which lies within the limits of this state shall be, and the same is hereby acknowledged to be, forever *ceded and relinquished* to the congress and government of the United States, in full and absolute right" "of soil," and "full and absolute" "exclusive jurisdiction" "of persons residing," &c. with a proviso that the right of soil should not *so* vest in the United States as to affect the rights of individuals therein. This implies an intention that the right of soil should vest in the United States wherever the rights of individuals should not be affected thereby. It is not only clear, therefore, that the state was competent to convey, and has used sufficient words of conveyance; but it is equally clear that it was its intention to convey, and that it has conveyed to the United States all its lands which were vacant at the date of the act, (19th December, 1791.) It follows, therefore, that on the 3d of April, 1792, the date of the survey, the state of Maryland had no vacant lands in the district of Columbia, liable to be surveyed under the warrant.

The act of 1791 gives the action only to a person whose title then existed, (19th Dec. 1791.) Beatty's title relates back no farther than the 16th of April, 1792, the date of the return of the certificate of survey, and the payment of the money to the state.

2. As to the statute of limitations. We admit that when a statute gives an entire *new cause of action*, it may not be barred by the act of limitations. But this statute only gives a new form of remedy upon an old cause of action. The declaration does not purport to be founded on the statute. It contains only a general count for money had and received to the Plaintiff's use.

As to a *trust* not being within the act of limitations, the cases on that point are all in equity. But here there was no trust. The parties were adverse Claimants.

F. S. KEY, *in reply.*

1. The state of Maryland had sovereign rights, and

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private rights. She meant to grant only her sovereign rights. She presumed that all the soil had been granted to individuals, and that there was no vacant land in the district. The terms she used are appropriate to a transfer of jurisdiction only.

The 3d section of the act of 1791 is conclusive that she did not mean to convey her private rights. By that section the lots in Carrollsburgh and Hamburgh, (small villages included within the lines of the city of Washington) which were the property of the state, were subjected to the same terms of trust as the other lots in the city. That is to say, one half thereof was to be reconveyed to the state, and the other half to be sold for the use of the public.

The constitution of Maryland speaks of the land office, and thereby continues all the rules and laws of that office. No lands could pass from the state but through the forms of the land office.

Beatty's title relates back at least as far as the 16th of April, 1792. But the special warrant was prior to the act of 1791, and the proviso of that statute saves all the rights of individuals, so that if Beatty had a right to locate his warrant in the city before the date of the act, that act did not deprive him of that right. He had a contrary title then existing. But if *he* had not, the statute had, and he claims as her assignee.

The statute did not mean to exclude the heirs and assigns of those who then had title from the benefit of the remedy provided.

2. As to the statute of limitations. Burnes received the money as trustee. When he received it he knew of Beatty's claim. 1 *Saund.* 37, 383. 4 *Bac. Ab.* 472.

PINKNEY, *as amicus curiæ,*

Stated that he had never heard of the relation of title being carried farther back than to the certificate of survey; even on a special warrant: for, although special, it may be located any where.

*March 1st. Absent...*JOHNSON, *J. and* LIVINGSTON, *J.*

BEATTY'S ADM'RS. v. BURNES'S ADM'R.

STORY, *J.* after stating the case, delivered the opinion of the Court as follows:

It is contended by the Plaintiffs in error that the direction of the Circuit Court was erroneous. 1. Because the Plaintiffs' intestate had a good and valid title to the land surveyed under his patent, and was, therefore, entitled under the 5th section of the Maryland statute of 1791, to the money received by the Defendant's intestate therefor. 2. That this right was not barred by the statute of limitations.

In support of the first point the Plaintiffs contend that the land belonging to the state did not, by the cession of the territorial jurisdiction under the statute of 1791, pass to the United States, and was consequently liable to be appropriated by individuals under warrants pursuant to the laws of Maryland. That until 1801 the jurisdiction of Maryland continued over the whole ceded territory; and titles, therefore, might legally be acquired therein according to the public laws: and the patent of Beatty, being obtained in pursuance of those laws, gave him a complete and valid title.

On the other hand the Defendant denies each of these positions, and further contends, that the Plaintiffs are without the purview of the 5th section of the act of 1791, because that section extends only to titles *then existing*, and Beatty's title did not commence until April, 1792.

It is not necessary to consider the correctness of the positions urged by the respective parties as to this point, because we are of opinion that the case may well be decided upon the second point.

The action for money had and received is clearly embraced by the statute of limitations; and it is incumbent upon the Plaintiffs to show that the present case forms an exception to its operation.

It is contended that the present suit, being a statute remedy, is not within the purview of the statute of limi-

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tations. But we know of no difference in this particular between a common law and statute right. Each must be pursued according to the general rule of law, unless a different rule be prescribed by statute; and where the remedy is limited to a particular form of action, all the general incidents of that action must attach upon it. Upon any other construction it would follow that the case would be without any limitation at all; for it would be quite impossible, upon any acknowledged principles, when a right had assumed the shape of a claim *in personam*, to attach to it a limitation which exclusively applied to the reality. Now the statute of limitations has been emphatically declared a statute of repose, and we should not feel at liberty to break in upon its general construction by allowing an exception which has not acquired the complete sanction of authority.

It is further contended, that by the operation of the act of 1791, ch. 45, Burnes must be considered as a mere trustee of Beatty, and trusts are not within the statute of limitations. We are of a different opinion. The land in controversy was claimed by Burnes in his own right, and adversely to the Plaintiffs' intestate. The money was received by him for his own use and in his own right as an original proprietor. He never admitted or acknowledged the title of the Plaintiff, and no claim or demand was ever made upon him in his life time. So far then from being received in trust, it was expressly received under a peremptory denial of any trust or right in the opposite party. Nor was the statute meant to make the adverse possessor without title a trustee for the party having title. It only substituted the action of assumpsit for the ordinary legal remedy by ejectment; and the adverse possessor of the land could no more be deemed a trustee of the money, than he could be deemed a trustee of the land itself, for the benefit of the rightful owner, against whom he held by an adverse title.

The Court are, therefore, of opinion that the statute of limitations is a good bar, and, therefore, that the judgment must be affirmed.

HARFORD, 1814.

CLAIMANT OF 480 PIECES OF COTTON BAGGING, March 1st.

v.

THE UNITED STATES.

Absent....JOHNSON, *J.*

THIS was an appeal from the Circuit Court for the district of South Carolina.

The penalty of the 50th sec. of the collection law of 2d March, 1799, which requires a permit for the landing of goods imported, applies to goods the importation of which was prohibited by law.

The case was submitted without argument.

STORY, *J.* delivered the opinion of the Court as follows:

The principal question in this case is, whether goods and merchandize, the importation of which into the United States was prohibited by the act of *18th of April*, 1806, *vol.* 8, *p.* 80, were within the purview of the *50th section of the collection act of 2d of March*, 1799, *vol.* 4, *p.* 360, so that the unlading of them without a permit, &c. was an offence subjecting them to forfeiture.

It has been contended on behalf of the claimant that they were not within the purview of the 50th section, because that section applies only to goods, wares and merchandize, the importation of which is lawful. To this construction the Court cannot yield assent. The language of the 50th section is, that "no goods, wares or merchandize, &c. shall be unladen, &c. without a permit;" it is therefore broad enough to cover all goods, whether lawful or unlawful. The case, being then within the letter, can be extracted from forfeiture only by shewing that it is not within the spirit of the section. To us it seems clear that the case is within the policy and mischief of the collection act, since the necessity of a permit is some check upon unlawful importations, and is one reason why it is required. The act of 1806 does not profess to repeal the 50th section of the collection act as to the prohibited goods, and a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and

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unavoidable. No such manifest repugnance appears to the court. The provisions may well stand together and indeed serve as mutual aids.

In fact the very point now presented was decided by this court in the case of *Locke, claimant, v. the United States*, at February term 1813.

The judgment of the Circuit Court is affirmed with costs.

ARMITZ BROWN *v.* THE UNITED STATES.

British property found in the United States, on land, at the commencement of hostilities with Great Britain, cannot be condemned as enemy's property, without a legislative act, authorising its confiscation. The act of the legislature, declaring war, is not such an act. Timber, floated into a salt water creek where the tide ebbs and flows, leaving the ends of the timber resting on the mud at low water, and prevented from floating away at high water by booms, is to be considered as landed.

THIS was an appeal from the sentence of the Circuit Court of Massachusetts, which condemned 550 tons of pine timber, claimed by Armitz Brown, the Appellant.

D. DAVIS, *for the Appellant.*

This is an appeal from the Circuit Court of Massachusetts, in which Court, the property consisting of about 550 tons of pine timber, twelve thousand staves, and eighteen tons of lathwood, were condemned. The libel states, that this cargo was loaded on board the *Emulous*, at Savannah, April 9th, 1812; that the cargo belonged to British subjects; that the ship departed for Plymouth, in England April 18th, in the same year, and put into New Bedford for repairs; and that the cargo was there unladen, and remained there until seized by Delano, as well on his own behalf, as on behalf of the United States. As to some of the allegations in the libel, there is no evidence whatever to support them; the ship never departed for Plymouth, never put into New Bedford *for repairs*. The facts are these:

The property in question was the cargo of the American ship Emulous, and was seized as enemy's property, about the 5th of April, A. D. 1813, nearly a year after the same had been discharged from the ship From the transcript in the case, it appears that the Emulous was owned by John Delano and others, citizens of the United States; that, in February, 1812, the owners, by their

agent, chartered the ship to Elijah Brown, as agent for Christopher Ide, Brothers and Co. and James Brown, British merchants; that, by the charter party, the ship was to proceed from Charleston, S. C. where she then lay, to Savannah, and there take on board a cargo of lumber, at a certain freight stipulated in the charter party, and proceed with the same to Plymouth, in England, to unload there, or at any other of his Britannic majesty's dock-yards in England. The ship proceeded to Savannah, took on board the cargo mentioned in the libel, and was there stopped by the embargo of the 4th of April, 1812. On the 25th of the same month of April, it was agreed between the master of the ship and the agent of the shippers, that the ship should proceed to New Bedford, where she was owned, with the cargo, and remain there, without prejudice to the charter party; which agreement is endorsed upon the back of the charter party. The ship accordingly proceeded to New Bedford, and remained there until the latter part of May following, when the cargo was finally unladed and discharged from the ship. The staves and lathwood were landed and put on a wharf. The timber was put into a salt water creek, which is not navigable, but where the tide ebbs and flows, and where the timber remained for safe keeping until the time of the seizure. The timber was secured in this creek by booms extended across the entrance thereof, and fastened by stakes driven into the flats. On the 7th of November, 1812, the property was sold to the claimant by E. Brown, the agent, in pursuance of the authority which he had for that purpose as agent of the shippers, and in pursuance of the advice of Delano, who afterwards seized it in the manner and for the purposes stated in the libel. This sale, the Appellant contends was made *bona fide* for a valuable consideration, which has since been paid, and after notice thereof given to Delano, in whose possession the property then was. The seizure was not made until five months after the property had been sold to the present claimant, and nearly twelve months after it was discharged from the ship. The claimant, it is admitted, is a citizen of the United States. E. Brown, the agent, by whom the property was sold, is a citizen of the United States, and James Brown, one of the owners of the cargo, is also a citizen of the United States, but resides in London and carries on trade and commerce in that city.

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Upon these facts, the principal point which will be contended for by the counsel for the claimants is, *that this property was lawfully acquired, before the declaration of war by the United States against Great Britain; and that, it being found here at the time of the breaking out of the war, under the faith of the government, it is not, by the modern law of nations, nor by any law of the United States, liable to confiscation.*

This question ought not to be decided upon the *rigorous* principles and the *ancient* practice of the law of nations; but according to the *mitigated* law of war, sanctioned by modern usage in civilized nations: For when the government of the United States was organized and finally established, it was not only its true policy, but its duty, "to receive the law of nations in its modern state of purity and refinement." *Per Judge Wilson* in the case of *Ware v. Hylton*, 3 *Dall.* 281. It is contended by the counsel for the claimant in this case, that the *principle* and the *usage* adopted and sanctioned by the modern law of nations, is this, "that enemy's property found in this country at the breaking out of a war, is not liable to confiscation." A different practice, said to have prevailed in Great Britain with regard to property in this situation, found afloat in their ports and harbors, will be hereafter considered.

The rule of the law of nations applicable to this case, is found in *Vattel, p.* 477. His words are, "The sove-"reign declaring war, can neither detain the persons "nor the *property* of those subjects of the enemy who are "within his dominions at the time of the declaration. "They came into his country under *the public faith*. By "permitting them to enter and reside in his territories, "he tacitly promised them full liberty and security for "their return. He is therefore bound to allow them a "reasonable time for withdrawing with their effects; "and if they stay beyond the time prescribed, he has a "right to treat them as enemies, though as enemies un-"armed. But if they are detained by an insurmounta-"ble impediment, as by sickness, he must necessarily "and for the same reason grant them a sufficient exten-"sion of the term." In order to shew the humane and liberal spirit with which the above rule is adopted by so-

foreigns in modern times, the same author adds, "At "present, so far from being wanting in this duty, sove- "reigns carry their attention to humanity *still further*; "so that foreigners who are subjects of the state against "which war is declared, are frequently allowed full time "for the settlement of their affairs."

Are not these just and equitable rules of the modern law of nations of authority in the Judicial Courts of the United States? Upon what principle or policy, are they to be rejected, and those of an age dark, and even barbarous in comparison with the present, adopted in their stead? Does it comport with the interest and character of this government, to *reject* principles and usages, calculated to ameliorate and mitigate the state of war and to promote the interest of commerce, which it appears have been *chearfully adopted* by all the *monarchies* of Europe? The contract which was entered into by the agents of the parties in this case, was made upon the presumption that, in case of war, the property would be safe. This presumption arose from the uniform practice, in similar cases, in all countries upon which the law of nations is binding.

It has been suggested that this rule in *Vattel* is applicable only to such *persons* as may happen to be in the country at the time of the declaration of war. Such, indeed, is the *letter* of the rule: But when there is the same reason, there is the same law; and no good reason can be assigned why the property of an *absent owner* should not be protected, as well as that of those who may happen to be resident in the country declaring war. In addition to this, it may be observed, that the owners of this property were, in law, present during the whole negotiation relative to this cargo, by their agent, E. Brown, by whom it was purchased, and who had the whole care and charge of it, at the time that war was declared.

If the correctness or authority of *Vattel* should be questioned, he will be found to be supported by other writers of high character.

In *Chitty's Law of Nations*, p. 67, it is thus written: "In strict justice, the right of seizure can take effect

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"only on those possessions of the belligerent, which "have come to the hands of his adversary *after the declaration of war.*" And again, in p. 80, "Such appears "to be, at present, the *law* and *practice* of civilized nations, with respect to hostile property *found within "their dominions at the breaking out of war.*" These opinions are not only fairly collected from modern writers upon the law of nations, but are entitled to particular respect as coming from a man of high character for his professional talents, and legal science; and who has done and written more to improve and reduce to system the common law of England, than any other writer upon that subject for the last thirty years.

The principles and practice of the modern law of nations here advocated, will also be found conformable to the common law. In *Magna Charta*, that venerable foundation of English law and liberty, it is provided, that merchant strangers in the realm of England at the beginning of a war, shall be protected from harm in body and goods, until it shall be made known to the high authorities of the nation, how British merchants should be treated in the enemy's country, and they were to be dealt with according to such treatment. *Magna Charta, chap.* 30. These provisions are commented upon, and emphatically eulogised by *Montesquieu, 2d vol. p.* 12.

Of similar character were the provisions of an ancient English statute, passed 27 *Edwd.* 3, *Stat.* 2, *chap.* 17, in which it is enacted, "that in case of war, mer-"chants shall not be sent suddenly out of the kingdom, "but may go out of the kingdom freely, with their "goods, within forty days, and shall not be in any thing "hindered or disturbed in their passage, *or to make pro-"fit of their merchandize if they wish to sell them*; or, if "in default of wind or ship, or any other adverse cause, "they cannot go, they shall have other forty days, within "which time they shall pass *with their merchandize, or "sell the same as before.*"

It is respectfully contended, that no act or measure of the American government has ever indicated a disposition adverse to those humane and liberal provisions and usages of the common law, and of the law of nations. On the contrary, so far as the disposition and policy of

the government may be discerned by implication, it has manifested its entire acquiescence in, and its readiness to adopt them upon all proper occasions. The spirit and disposition of the government upon this subject, is apparent from the provisions in (I believe it may be said) *every treaty* which has been entered into since the establishment of the government. Articles for the protection and removal of the property of enemies found in this country at the breaking out of a war, are found in our treaties with France, Spain, Holland, Sweden, Prussia, Morocco, England and *Algiers*. It will not be contended, that the provisions of these treaties, especially that with England, can be binding, when the treaties themselves are not in force; but the uniform practice of those governments, in agreeing to these provisions, is evidence of the highest nature, that the government of the United States have adopted, and mean to adhere to the modern law of nations in this respect; that it approves the liberality of the modern usages, and *rejects*, and, I hope I may add, *abhors* the *rigorous* rules and contracted principles of the ancient jurists; that the spirit of the government, and the character of its policy, is to cherish and carry into practice every principle and every custom and usage, which is found favorable to commerce, and which will mitigate the evils incident to a state of war.

In the proceedings and measures of the government *since the war*, there can be found no expression of its will, that property in the situation of this cargo, should be confiscated or claimed for the use of the government—on the contrary, there are indications of another and more benign complexion. By the *act of July 6th, 1812, sect.* 6, the president was authorized, within six months from the date of the act, "to give passports "for the safe transportation of any ship or property "belonging to British subjects, then within the limits "of the United States." Nothing, therefore, can be more clear, than that it was not the wish or intention of government, to claim or confiscate property, belonging to the enemy, then in the United States. If such had been its policy, instead of the liberal provisions of this statute, provision would have been made in this statute, or in the act declaring war, not only expressive

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of the public will upon this subject, but expressly declaring British property then within the United States liable to confiscation.

By the provisions of this statute, it is apparent that if this property had been on board a *British* ship, or if a British ship had been found in which to transport it, it would have come directly within the authority of the president, as to its safe transportation. Surely, then, it could never have been the intention of Congress to have it confiscated upon the ground that it had been lawfully on board an American ship, in the regular course of trade, was there arrested by the embargo, and then, for the convenience of all parties, discharged from the ship, and placed in a proper situation for safe keeping, to abide the events of the embargo and the war.

The Court will also notice, that, previous to the expiration of the six months allowed by the act of congress, above quoted, for the exportation of British property, this cargo had been sold with the knowledge and approbation of the Libellant. This transfer, having been made *bona fide*, conferred other and new rights upon a third party, viz: the present Claimant. The principle quoted and relied upon, that that transfer was void upon the ground that it was made by an alien enemy in time of war, was probably never contemplated or known by the parties to the contract; and this may furnish a *satisfactory*, though perhaps not strictly a *legal* reason, why this property was not exported under the president's passport. At any rate, if the Court should be satisfied that this property is not liable to confiscation, either by the law of nations or by any act of congress, they will not trouble themselves about the effect of the transfer, but leave the parties interested to settle that matter among themselves.

Before the Court will condemn this property, they will search for some proof of a decided intention, on the part of the government, that such property should be confiscated. It appears that all the acts of congress, so far as they can be interpreted with reference to this question, manifest a contrary spirit. The act declar-

ing war, speaks no language adverse to the claim of the Appellant. The prize act of the 26th of June, 1812, does not even glance at property in this situation. Will the Court assume the power, *by implication*, to condemn the property; and this, too, against the most explicit declarations of the public will, so far as they can be collected from measures of an analogous nature? Why is this case singled out? Why do not the district attornies enter the warehouses in the numerous sea-ports, and hunt for booty of this description? Such a proceeding would be as legal and as *liberal* as the present, though probably attended with serious mischief to the country, if retaliatory proceedings and measures should be adopted by the enemy; for it is a well known fact, that the amount of American property in England at the commencement of the war, was *immensely* greater than that of English property in America, at the same period.

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It was stated, in the argument below, that the question relative to the confiscation of debts, or *choses* in action, is illustrative of that which relates to the confiscation of goods. The modern usage and law of nations, and of our own country, relative to the confiscation of debts, are equally favorable to the Claimant in this case.

In the first place, it is distinctly denied, that there exists any power to confiscate the private debts of the enemy, excepting by a positive act of Congress. What figure would the attorney of the United States make, with a libel in the judicial Courts, praying for a confiscation of a private debt? The exclusive right of this kind of confiscation, and even of goods, is in the legislature—per *Chase, Justice,* in the case of *Ware v. Hylton,* 3, *Dall.* 281. The question which has been discussed by the writers upon the law of nations, is, whether it be lawful for the *sovereign* thus to confiscate. And although it is admitted that he *may* do it, yet, "in "regard to the safety of commerce, all the sovereigns "of Europe *have departed from this rigor*; and as this "*custom* has been generally received, he who would act "contrary to it, would *injure the public faith*; for "strangers trusted his subjects upon the presumption "that the *general custom* would prevail." *Vattel, lib.* 3.

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ch. 5, sect. 77. The laws and customs of the United States ought to be so expounded as to conform to the modern law of nations, which is *adverse* to the confiscating of debts. Indeed the confiscation of debts has become *disreputable;* and it has been *feelingly* observed by a late learned judge of this Court, that "not a single "confiscation of this kind *stained the code of any Euro-* "*pean power* engaged in the war which our revolution "produced"—3, *Dall.* 281.

It will be admitted that the question relative to the confiscation of debts, or *choses* in action, is illustrative of the question relative to the confiscation of the private property of an enemy, found here under the faith of government at the breaking out of the war. Indeed the law and practice is, and ought to be, the same in both cases; and until a law of congress shall be produced, confiscating property of this description, the judicial Courts will not only proceed to do it with great reluctance, but will never assume an authority of that kind, unless furnished with it by a legislative act, any more than in the confiscation of a private debt. In addition to all this, it seems to be now perfectly settled by the modern law and practice of nations, that debts are never to be confiscated; that it has become a disgraceful act in any government that does it; that these debts are *suspended,* and the right to recover them necessarily taken away by the war; but that upon the return of peace, the debts are revived, and the right to recover them perfectly restored.

The condemnation of this property is demanded upon the ground that the embargo of the 4th of April, 1812, arrested and detained it until the act of congress took place declaring war; and that *that* act had a retroactive effect, and justifies the condemnation of this property. But to this it is answered: the embargo of the 4th of April was not a hostile, but a civil embargo; and no such construction was ever given to an embargo, not of a hostile character. That this embargo was not of this character is most manifest from this, that express provision was made for the departure of any foreign ships or vessels, either in ballast or with the goods, wares and merchandize, on board of such foreign ship or vessel when notified of the act. It was, therefore, the

being laden on board a vessel of the United States that prevented the departure of this property. If it had been on board a foreign, even a British, ship, it would not have been detained. That it was actually laden on board, at the time of the notice of the embargo, manifestly appears from the record. This, it is conceived, is a sufficient answer to the claim of the government to this property, upon the ground that it was stopped by the embargo, and liable to confiscation by the retroactive operation of the act of congress declaring war. The authorities in support of the principles here contended for, respecting the difference between hostile and civil embargoes, must be familiar to the Court, and need not be cited.

But the practice of the British government is relied upon as a rule by which the Court are to be governed in the present case. It is admitted that the English Courts of admiralty have condemned *vessels detained in port* by an embargo, and found there at the breaking out of hostilities: but it is explicitly denied that they have ever condemned property found on land, in that situation. 1 *Rob.* 228.

If, however, the English Courts of admiralty have done wrong, and proceeded against the modern law of nations in these cases, this honorable Court will not, *for that reason*, adopt so unjust a practice. The condemnation of property, arrested in the ports of Great Britain by an embargo, to which a hostile character is afterwards given by a subsequent declaration of war, appears to be a departure from the modern usages of nations, and cannot be justified by or reconciled with the spirit of those usages. But as they have never condemned property in this situation, except such as has been found not only afloat, but in *vessels detained in their ports by an embargo*, their decisions can form no precedent in this case; for the property which is the subject of this prosecution, was either on land, or in such a situation as that it could not be the subject upon which an embargo could operate; or, in other words, the staves and lathwood were literally on the land; and the pine timber so discharged from the ship and so deposited, as to be entitled to the same protection as if actually landed and stored.

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The rule adopted in the English Court of Admiralty, as laid down in *2 Rob.* 211, is this: "All *vessels* detained in port, and found there at the breaking out of hostilities, are condemned, *jure coronæ*, to the king; and all coming in after hostilities, not voluntarily by revolt, but ignorant of the war, are condemned as *droits of admiralty*. This rule, both in its import and application, has been adopted, it is conceived, only in cases of *vessels and their cargoes found in the ports* of Great Britain. There can be no reason for their application in this country to property found on the land, or to property, although waterborne yet, in the same situation, in reason and in fact, as if found *literally* on land.

Of this description is the property in question. By referring to the record, particularly the depositions of E. Brown and of Silas Allen, the condition of this property, from the time it was discharged from the ship to the time it was seized by Delano, may be learned, from whence it will appear that the allegation in the libel, that the property was on the high seas, is wholly without foundation. The staves and lathwood were *landed* and on a *wharf*. With respect to these, there can be no doubt. The timber was discharged from the ship in the month of May, previous to the declaration of war; it is of such description that it did not admit of being *stored;* it would have been injured by lying on the land; and the only place proper to keep it in, was the one selected, a creek, or small cove, where the tide ebbs and flows, but which was not navigable even for boats or scows; for it seems it was necessary to clear it out to admit a scow into it. Moreover, it was necessary to secure the entrance of this creek by booms or timber laid across its mouth, fastened by piles or stakes driven into the flats. This timber was thus secured and stored in the usual way in which property of this description is managed; and was, to all intents and purposes, as much lodged and *impounded* in this place, under a bailment, and in civil hands. *(1 Rob. p. 228)* as if it had been in a ship yard. It must, therefore, be a great stretch of power and prerogative to extend the reason of the practice of Great Britain in condemning property found in its harbors and on board vessels, to property in the situation of that in question: and unless the practice of Great Britain has extended to the seizure

and condemnation of enemies' property found on land at the time of breaking out of hostilities, no sanction can be derived from her practice in favor of the confiscation of this property.

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The case, was submitted by the *Attorney General* upon the argument contained in the opinion of the honorable judge Story, in the Circuit Court, which came up in the transcript of the record.

Wednesday, March 2d. Present.....All the Judges.

MARSHALL, *Ch. J.* delivered the opinion of the Court, as follows:

The material facts in this case are these:

The *Emulous* owned by John Delano and others citizens of the United States, was chartered to a company carrying on trade in Great Britain, one of whom was an American citizen, for the purpose of carrying a cargo from Savannah to Plymouth. After the cargo was put on board, the vessel was stopped in port by the embargo of the 4th of April, 1812. On the 25th of the same month, it was agreed between the master of the ship and the agent of the shippers, that she should proceed with her cargo to New Bedford, where her owners resided, and remain there without prejudice to the charter party. In pursuance of this agreement, the Emulous proceeded to New Bedford, where she continued until after the declaration of war. In October or November, the ship was unloaded and the cargo, except the pine timber, was landed. The pine timber was floated up a salt water creek, where, at low tide, the ends of the timber rested on the mud, where it was secured from floating out with the tide, by impediments fastened in the entrance of the creek. On the 7th of November, 1812, the cargo was sold by the agent of the owners, who is an American citizen, to the Claimant, who is also an American citizen. On the 19th of April, a libel was filed by the attorney for the United States, in the district Court of Massachusetts, against the said cargo, as well on behalf of the United States of America as for and in behalf of John Delano and of all other persons concerned. It does not appear

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that this seizure was made under any instructions from the president of the United States; nor is there any evidence of its having his sanction, unless the libels being filed and prosecuted by the law officer who represents the government, must imply that sanction.

On the contrary, it is admitted that the seizure was made by an individual, and the libel filed at his instance, by the district attorney who acted from his own impressions of what appertained to his duty. The property was claimed by Armitz Brown under the purchase made in the preceding November.

The district Court dismissed the libel. The Circuit Court reversed this sentence, and condemned the pine timber as enemy property forfeited to the United States. From the sentence of the Circuit Court, the Claimant appealed to this Court

The material question made at bar is this. Can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war?

The cargo of the Emulous having been legally acquired and put on board the vessel, having been detained by an embargo not intended to act on foreign property, the vessel having sailed before the war, from Savannah, under a stipulation to re-land the cargo in some port of the United States, the re-landing having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the Court cannot perceive any solid distinction, so far as respects confiscation, between this property and other British property found on land at the commencement of hostilities. It will therefore be considered as a question relating to such property generally, and to be governed by the same rule.

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations

of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chuse to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court.

The questions to be decided by the Court are:

1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?

2d. Is there any legislative act which authorizes such seizure and condemnation?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask,

Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and, although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which

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were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The enquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same. What then is this operation?

Even *Bynkershoek*, who maintains the broad principle, that in war every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by "war consists more in fact than in law." He adds to his observations on this subject, "let it not, however, "be supposed that it is only true of actions, that they "are not condemned *ipso jure*, for other things also be"longing to the enemy may be concealed and escape "condemnation."

Vattel says, that "the sovereign can neither detain "the persons nor the property of those subjects of the "enemy who are within his dominions at the time of "the declaration."

It is true that this rule is, in terms, applied by *Vattel* to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the

enemy in the sovereign, his presence could not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

Chitty, after stating the general right of seizure, says, "But, in strict justice, that right can take effect only "on those possessions of a belligerent which have come "to the hands of his adversary after the declaration of "hostilities."

The modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

This rule appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.

If we look to the constitution itself, we find this general reasoning much strengthened by the words of that instrument.

That the declaration of war has only the effect of

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placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. "Congress "shall have power"—"to declare war, grant letters of "marque and reprisal, and make rules concerning cap- "tures on land and water."

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water, is to be confined to captures which are exterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to congress of the power in question as an independent substantive power, not included in that of declaring war.

The acts of congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the territory.

War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

The "act for the safe keeping and accommodation of prisoners of war," is of the same character.

The act prohibiting trade with the enemy, contains this clause:

"And be it further enacted, That the president of "the United States be, and he is hereby authorized to "give, at any time within six months after the passage

"of this act, passports for the safe transportation of "any ship or other property belonging to British sub- "jects, and which is now within the limits of the United "States."

The phraseology of this law shows that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act confers on the president, is manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt. Is there in the act of congress, by which war is declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the president of the United States to use the whole land and naval force of the United States to carry the war into effect, and "to issue to private "armed vessels of the United States, commissions or "letters of marque and general reprisal against the "vessels, goods and effects of the government of the "united kingdom of Great Britain and Ireland, and "the subjects thereof."

That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that, in the declaration of war, the nation has expressed its will to that effect.

It cannot be necessary to employ argument in showing that when the attorney for the United States institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

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The "act concerning letters of marque, prizes and prize goods," certainly contains nothing to authorize this seizure.

There being no other act of congress which bears upon the subject, it is considered as proved, that the legislature has not confiscated enemy property which was within the United States at the declaration of war, and that this sentence of condemnation cannot be sustained.

One view, however, has been taken of this subject which deserves to be further considered.

It is urged that, in executing the laws of war, the executive may seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of

our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary. BROWN v. U. STATES.

It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war. The Court is therefore of opinion that there is error in the sentence of condemnation pronounced in the the Circuit Court in this case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed.

STORY, *J.*

In this case, I have the misfortune to differ in opinion from my brethren; and as the grounds of the decree were fully stated in an opinion delivered in the Court below, I shall make no apology for reading it in this place.

"This is a prize allegation filed by the district attorney, in behalf of the United States, and of John Delano, against 550 tons of pine timber, part of the cargo of the American ship Emulous, which was seized as enemies' property, about the 5th day of April, 1813, after the same had been discharged from said ship, and while afloat in a creek or dock at New Bedford, where the tide ebbs and flows.

From the evidence in this case, it appears that the ship Emulous is owned by the said John Delano, John Johnson, Levi Jenny, and Joshua Delano of New Bedford, and citizens of the United States. On the 3d day of February 1812, the owners, by their agents, entered into a charter-party with Elijah Brown as agent of Messrs. Christopher Idle, Brother and Co. and James Brown, of London, merchants, for said ship, to proceed from the port of Charleston, South Carolina, (where the ship then lay,) to Savannah, in Georgia, and there take on board a cargo of timber and staves, at a certain

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freight stipulated in the charter-party, and proceed with the same to Plymouth, in England, "for orders to unload there or at any other of his majesty's dock-yards in England." The ship accordingly proceeded to Savannah, took on board the agreed cargo, and was there stopped by the embargo laid by Congress on the 4th of April 1812. On the 25th of the same April, it was agreed between Mr. E. Brown and the master of the ship, that she should proceed with the cargo to, and lay at New Bedford, without prejudice to the charter-party. The ship accordingly proceeded for New Bedford, and arrived there in the latter part of May 1812, where, it seems, the cargo was finally, but the particular time is not stated, unloaded by the owners of the ship, the staves put into a warehouse, and the timber into a salt water creek or dock, where it has ever since remained, waterborne, under the custody of said John Delano, by whom the subsequent seizure was made, for his own benefit and the benefit of the United States. On the 7th November, 1812, Mr. Elijah Brown, as agent for the British owners, (one of whom, James Brown, is his brother,) sold the whole cargo to the present claimant, Mr. Armitz Brown (who it should seem is also his brother) for 2433 dollars and 67 cents, payable in nine months, for which the claimant gave his note accordingly. The master of the ship, Capt. Allen, swears that, at the time of entering into the charter-party, Mr. Elijah Brown stated to him that the British owners had contracted with the British government to furnish a large quantity of timber to be delivered in some of his majesty's dock-yards.

Besides the claim of Mr. Brown, there is a claim interposed by the owners of the ship Emulous, praying for an allowance to them of their expenses and charges in the premises.

A preliminary exception has been taken to the libel for a supposed incongruity in blending the rights of the United States and of the informer in the manner of a *qui tam* action at the common law.

I do not think this exception is entitled to much consideration. It is, at most, but an irregularity which cannot affect the nature of the proceedings, or oust the jurisdiction of this Court. If the informer cannot legal-

ly take any interest, the United States have still a right, if their title is otherwise well founded, to claim a condemnation: Nor would a proceeding of this nature be deemed a fatal irregularity in Courts having jurisdiction of seizures, whose proceedings are governed by much more rigid rules than those of the admiralty. It is a principle clearly settled at the common law, that any person might seize uncustomed goods to the use of himself and the king, and thereupon inform of the seizure; and if, in the exchequer, the informer be not entitled to any part, the whole shall, on such information, be adjudged to the king. For this doctrine we have the authority of lord Hale. *Harg. law tracts*, 227. And the solemn judgment of the Court, in *Roe v. Roe*, *Hardr.* 185.—and *Malden v. Bartlett*, *Parker*, 105. The same rule most undoubtedly exists in the prize Court, and, as I apprehend, applies with greater latitude. All property captured belongs originally to the crown; and individuals can acquire a title thereto in no other manner than by grant from the crown. *The Elsebe*, 5, *Rob.* 173.—11. *East*, 619.—*The Maria Francoise*. 6 *Rob.* 282. This, however, does not preclude the right to seize; on the contrary, it is an indisputable principle in the English prize Courts, that a subject may seize hostile property for the use of the crown, wherever it is found; and it rests in the discretion of the crown whether it will or will not ratify and consummate the seizure by proceeding to condemnation. But to the prize Court it is a matter of pure indifference whether the seizure proceeded originally from the crown, or has been adopted by it; and whether the crown would take *jure coronae*, by its transcendant prerogative, or *jure admiralitatis*, as a flower annexed by its grant to the office of lord high admiral. The cases of captures by non-commissioned vessels, by commanders on foreign stations, anterior to war, by private individuals in port or on the coasts, and by naval commanders on shore on unauthorised expeditions, are all very strong illustrations of the principle. *The Aquila*, 1. *Rob.* 37.—*The Twee Gesuster*, 2. *Rob.* 284, *note*.—*The Rebeckah*, 1. *Rob.* 227.—*The Gertruyda*, 2. *Rob.* 211.—*The Melomane*, 5. *Rob.* 41.—*The Charlotte*, 4. *Rob.* 282.—*The Richmond*, 5. *Rob.* 325.—*Thorshaven*, 1. *Edw.* 102.—*Hale in Harg. law tracts*, *ch.* 28. *p.* 245. And in cases where private captors seek condemnation to themselves, it is the settled course of the Court, on failure of their title, to decree

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condemnation to the crown or the admiralty, as the circumstances require. *The Walsingham Packet, 2. Rob.* 77.—*The Etrusco, 4. Rob. 262. note.—and the cases cited supra.* Nor can I consider these principles of the British Courts a departure from the law of nations. The authority of *Puffendorf* and *Vattel* are introduced to shew that private subjects are not at liberty to seize the property of enemies without the commission of the sovereign, and if they do they are considered as pirates. But when attentively considered, it strikes me that, taking the full scope of these authors, they will not be found to support so broad a position. *Puff. B. 8. ch. 6. § 21.—Vattel, B. 3. ch. 15. § 223, 224, 225, 226, 227. Vattel* himself admits (§ 234,) that the declaration of war, which enjoins the subjects at large to attack the enemy's subjects, implies a general order; and that to commit hostilities on our enemy without an order from our sovereign after the war, is not a violation so much of the law of nations as of the public law applicable to the sovereignty of our own nation, (§ 225.) And he explicitly states, (§ 226.) that, by the law of nations, when once two nations are engaged in war, all the subjects of the one may commit hostilities against those of the other, and do them all the mischief authorized by the state of war. All that he contends for is, that though, by the declaration, all the subjects in general are ordered to attack the enemy, yet that by custom this is usually restrained to persons acting under commission; and that the general order does not invite the subjects to undertake any offensive expedition without a commission or particular order; (§ 227.) and that if they do, they are not usually treated by the enemy in a manner as favorable as other prisoners of war, (§ 226.) And *Vattel* (§ 227) explicitly declares, that the declaration of war "authorizes, indeed, and even obliges every subject, of whatever rank, to secure the persons and *things* belonging to the enemy, when they fall into his hands. And he then goes on to state cases in which the authority of the sovereign may be presumed, (§ 228.) The whole doctrine of Vattel, fairly considered, amounts to no more than this, that the subject is not required, by the mere declaration of war, to originate predatory expeditions against the enemy; that he is not authorized to wage war contrary to the will of his own sovereign; and that, though the ordinary declaration of war imports a general authority to attack the en-

emy and his property, yet custom has so far restrained its meaning, that it is in general confined to persons acting under the particular or constructive commission of the sovereign. If, therefore, the subject do undertake a predatory expedition, it is an infringement of the public law of his own country, whose sovereignty he thus invades, but it is not a violation of the law of nations of which the enemy has a right to complain. But if the property of the enemy *fall* into the hands of a subject, he is bound to secure it.

For every purpose applicable to the present case, it does not seem necessary to controvert these positions; and, whatever may be the correctness of the others, I am perfectly satisfied that the position is well founded, that no subject can legally commit hostilities, or capture property of an enemy, when, either expressly or constructively, the sovereign has prohibited it. But suppose he does, I would ask if the sovereign may not ratify his proceedings; and thus, by a retroactive operation, give validity to them? Of this there seems to me no legal doubt. The subject seizes at his peril, and the sovereign decides, in the last resort, whether he will approve or disapprove of the act. *Thorshaven*, 1, *Edw.* 102. The authority of *Puffendorf* is still less in favor of the position of the Claimant's counsel. In the section cited (*book* 8, *ch.* 6, *sec.* 21.) Puffendorf considers the question to whom property captured in war belongs; a question also examined by *Vattel* in the 229th section of the book and chapter above referred to. In the course of that discussion, Puffendorf observes, "that it may be very justly questioned, whether every thing taken in war, by *private hostilities*, and by the bravery of private subjects that have no commission to warrant them, belongeth to them that take it. For this is also a part of the war, to appoint what persons are to act in a hostile manner against the enemy, and how far: and, in consequence, no private person hath power to make devastations in an enemy's country or to carry off spoil or plunder without permission from his sovereign: and the sovereign is to decide how far private men, when they are permitted, are to use that liberty of plunder; and whether they are to be the sole proprietors in the booty or only to share a part of it: so that all a private adventurer in war can pretend to, is no more than

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what his sovereign will please to allow him; for to be a soldier and to act offensively, a man must be commissioned by public authority."

As to the point upon which Puffendorf here expresses his doubts, I suppose that no person, at this day, entertains any doubts. It is now clear, as I have already stated, that all captures in war enure to the sovereign, and can become private property only by his grant. But is there any thing in Puffendorf to authorize the doctrine, that the subject so seizing property of the enemy, is guilty of a very enormous crime—of the odious crime of piracy? And is there, in this language, any thing to show that the sovereign may not adopt the acts of his subjects, in such a case, and give them the effect of full and perfect ratification? It has not been pretended, that I recollect, that Grotius supports the position contended for. To me it seems pretty clear that his opinions lean rather the other way; viz: to support the indiscriminate right of captors to all property captured by them. *Grotius, lib. 3, ch. 6, sec. 2, sec. 10, sec. 12.* *Bynkershoek* has not discussed the question in direct terms. In one place (*Bynk. Pub. Juris, ch. 3,*) he says, that he is not guilty of any crime, by the laws of war, who invades a hostile shore in hopes of getting booty. It is true that, in another place (*id. ch. 20,*) he admits, in conformity to his doctrine elsewhere, (*id. ch. 17,*) that if an uncommissioned cruizer should sail for the purpose of making hostile captures, she might be dealt with as a pirate, if she made any captures except in self-defence. But this he expressly grounds upon the municipal edicts of his own country in relation to captures made by its own subjects. And he says, every declaration of war not only permits but expressly orders all subjects to injure the enemy by every possible means; not only to avert the danger of capture, but to capture and strip the enemy of all his property. And, looking to the general scope of his observations, (*id. ch. 3, 4, & ch. 16 & 17.*) I think it may, not unfairly, be argued that, independent of particular edicts, the subjects of hostile nations might lawfully seize each other's property wherever found: at least, he states nothing from which it can be inferred that the sovereign might not avail himself of property captured from the enemy by uncommissioned subjects. On

the whole, I hold that the true doctrine of the law of nations, found in foreign jurists, is, that private citizens cannot acquire to themselves a title to hostile property, unless it is seized under the commission of their sovereign; and that, if they depredate upon the enemy, they act upon their peril, and may be liable to punishment, unless their acts are adopted by their sovereign. That, in modern times, the mere declaration of war is not supposed to clothe the citizens with authority to capture hostile property, but that they may lawfully seize hostile property in their own defence, and are bound to secure, for the use of the sovereign, all hostile property which falls into their hands. If the principles of British prize law go further, I am free to say that I consider them as the law of this country.

I have been led into this discussion of the doctrine of foreign jurists, farther than I originally intended; because the practice of this Court in prize proceedings must, as I have already intimated, be governed by the rules of admiralty law disclosed in English reports, in preference to the mere *dicta* of elementary writers. I thought it my duty, however, to notice these authorities, because they seem generally relied on by the Claimant's counsel. In my judgment, the libel is well and properly brought; at least for all the purposes of justice between the parties before the Court; and I overrule the exception taken to its sufficiency.

Having disposed of this objection, I come now to consider the objection made by the United States against the sufficiency of the claim of Mr. Brown; and I am entirely satisfied that his claim must be rejected. It is a well known rule of the prize Court, that the *onus probandi* lies on the Claimant; he must make out a good and sufficient title before he can call upon the captors to shew any ground for the capture. *The Walsingham packet, 2, Rob. 77.* If, therefore, the Claimant make no title, or trace it only by illegal transactions, his claim must be rejected, and the Court left to dispose of the cause, as the other parties may establish their rights. In the present case, Mr. Brown claims a title by virtue of a contract and sale made by alien enemies since the war: I say by alien enemies; for it is of no importance what the character of the agent is; the transaction

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must have the same legal construction as though made by the aliens themselves. Now admitting that this sale was not colorable, but *bona fide*, which, however, I am not, at present, disposed to believe, still it was a contract made with enemies, pending a known war; and therefore invalid. No principle of national or municipal law is better settled, than that all contracts with an enemy, made during war, are utterly void. This principle has grown hoary under the reverend respect of centuries; (19, *Edw.* 4, 6, *cited Theol. Dig. lib.* 1, *ch.* 6, *sec.* 21. *Ex parte Bonsmaker.* 13, *Ves. jun.* 71—*Briston v. Towers*, 6, *T. R.* 45,) and cannot now be shaken without uprooting the very foundations of national law. *Bynk. Quæst. Pub. Juris, ch.* 3.

I, therefore, altogether reject the claim interposed by Mr. Brown. What, then, is to be done with the property? It is contended, on the part of the United States, that it ought to be condemned to the United States, with a recompense, in the nature of salvage, to be awarded to Mr. Delano. On the part of the Claimant's counsel (who, under the circumstances, must be considered as arguing as *amicus curiæ* to inform the conscience of the Court) it is contended, 1st. That this Court, as a Court of prize, has no proper jurisdiction over the cause. 2d. That if it have jurisdiction, it cannot award condemnation to the United States, for several reasons. 1st. Because, by the law of nations, as now understood, no government can lawfully confiscate the debts, credits, or visible property of alien enemies, which have been contracted or come into the country during peace. 2d. Because, if the law of nations does not, the common law does afford such immunity from confiscation to property situated like the present. 3d. Because, if the right to confiscate exist, it can be exercised only by a positive act of congress, who have not yet legislated to this extent. 4th. Because, if the last position be not fully accurate, yet, at all events, this process, being a high prerogative power, ought not to be exercised, except by express instructions from the president, which are not shown in this case.

Some of these questions are of vast importance and most extensive operation; and I am exceedingly obliged to the gentlemen who have argued them with so

much ability and learning, for the light which they have thrown upon a path so intricate and obscure. I have given these questions as much consideration as the state of my health and the brevity of time would allow; and I shall now give them a distinct and separate discussion, that I may at least disclose the sources of my errors, if any, and enable those who unite higher powers of discernment with more extensive knowledge, to give a more exact and just opinion.

And first....As to the jurisdiction of this Court in matters of prize.

This depends partly on the prize act of 26th June, 1812, ch. 107, § 6, and partly on the true extent and meaning of the admiralty and maritime jurisdiction conferred on the Courts of the United States. The act of 26th June, 1812, ch. 107, provides that in all cases of captured vessels, goods and effects which shall be brought within the jurisdiction of the United States, the district Court shall have exclusive original cognizance thereof, as in civil causes of admiralty and maritime jurisdiction. The act of 18th June, 1812, ch. 102, declaring war, authorizes the president to issue letters of marque and reprisal to private armed ships against the vessels, goods and effects of the British government and its subjects; and to use the whole land and naval force of the United States to carry the war into effect. In neither of these acts is there any limitation as to the places where captures may be made on the land or on the seas; and, of course, it would seem that the right of the Courts to adjudicate respecting captures would be co-extensive with such captures, wherever made, unless the jurisdiction conferred is manifestly confined by the former act to captures made by private armed vessels. It is not, however, necessary closely to sift this point, as it may now be considered as settled law, that the Courts of the United States, under the judicial act of 30th September, 1789, ch. 20, have, by the delegation of all civil causes of admiralty and maritime jurisdiction, at least as full jurisdiction of all causes of prize as the admiralty in England. *Glass and al. v. the sloop Betsey and al.* 3 *Dall.* 6. *Talbot v. Janson*, 3 *Dall.* 133 *Penhallow and al. v. Doane's administrators.* 3 *Dall.* 54 *Jennings v. Carson*, 4 *Cranch*, 2. Over what captures,

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then, has the admiralty jurisdiction as a prize Court? This is a question of considerable intricacy, and has not as yet, to my knowledge, been fully settled. It has been doubted whether the admiralty has an inherent jurisdiction of prize, or obtains it by virtue of the commission usually issued on the breaking out of war. That the exercise of the jurisdiction is of very high antiquity and beyond the time of memory, seems to be incontestible. It is found recognized in various articles of the black book of the admiralty, in public treaties and proclamations of a very early date, and in the most venerable relics of ancient jurisprudence. See *Robb. Coll. Marit. Intro. p.* 6, 7. *Id. Instructions*, 3 *H.* 8, *p.* 10, *art.* 18, *&c. Id. p.* 12, *note letter. Edw.* 3, *A. D.* 1343. *Treaty Henry* 7 *and Charles* 8, *A. D.* 1497. *Rob. Coll. Marit. p.* 83 *and p.* 98, *art.* 8. *Rob. Coll. Mar. p.* 189, *note. Roughton, art.* 19, 20, *&c. &c. passim.* In *Lindo v. Rodney, Doug.* 613, *note*, Lord *Mansfield*, in discussing the subject, admits the immemorial antiquity of the prize jurisdiction of the admiralty; but leaves it uncertain whether it was coeval with the instance jurisdiction, and whether it is constituted by special commission, or only called into exercise thereby. After the doubts of so eminent a judge, it would not become me to express a decided opinion. But taking the fact that, in the earliest times, the jurisdiction is found in the possession of the admiralty, independent of any known special commission; that, in other countries, and especially in France, upon whose ancient prize ordinances the administration of prize law seems, in a great measure, to have been modelled, (*Vide Ordin. of France. A. D.* 1400, *Rob. Coll. Marit. p.* 75. *Ordin. of France, A. D.* 1584. *Id. p.* 105. *Treaty Henry* 7 *and Charles* 8. *Id. p.* 83, and *Rob. note, Id.* 105) the jurisdiction has uniformly belonged to the admiralty; there seems very strong reason to presume that it always constituted an ordinary and not an extraordinary branch of the admiralty powers: and so I apprehend it was considered by the Supreme Court of the United States, in *Glass and al. v. the Betsey*, 3 *Dall.* 6.

However this question may be, as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, as to which I give no opinion, it is very clear that its jurisdiction is not

confined to mere captures at sea. The prize jurisdiction does not depend upon locality, but upon the subject matter. The words of the prize commission contain authority to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships and goods that are and shall be taken. The admiralty, therefore, not only takes cognizance of all captures made at sea, in creeks, havens and rivers, but also of all captures made on land, where the same have been made by a naval force, or by co-operation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications. *Key and Hubbard v. Pearse*, cited in *Le Caux v. Eden*, *Doug.* 606. *Lindo v. Rodney*, *Doug.* 613, *note*. *The capture of the Cape of Good Hope*, 2 *Rob.* 274. *The Stella del Norte*, 5 *Rob.* 349. *The island of Trinidad*, 5 *Rob.* 92. *Thorshaven*, 1 *Edw.* 102. *The capture of Cheinsurah*, 1 *Deten.* 179. *The Rebeckah*, 1 *Rob.* 227. *The Gertruyda*, 2 *Rob.* 211. *The Maria Francoise*, 6 *Rob.* 282.

Such, then, being the acknowledged extent of the prize jurisdiction of the admiralty, it is, at least in as ample an extent, conferred on the Courts of the United States. For the determination, therefore, of the case before the Court, it is not necessary to claim a more ample jurisdiction; for the capture or seizure, though made in port, was made while the property was waterborne. Had it been landed and remained on land, it would have deserved consideration whether it could have been proceeded against as prize, under the admiralty jurisdiction, or whether, if liable to seizure and condemnation in our Courts, the remedy ought not to have been pursued by a process applicable to municipal confiscations. On these points I give no opinion. See the case of the *Oester Ems* cited in the *Two Friends*, 1 *Rob.* 284, *note*. *Hale de Portubus Maris*, *&c. in Harg. Law tracts*, *ch.* 28, *p.* 245, *&c.* *Parker Rep.* 267.

Having disposed of the question as to the jurisdiction of this Court, I come to one of a more general nature; viz. Whether, by the modern law of nations, the sovereign has a right to confiscate the debts due to his enemy, or the goods of his enemy found within his territory at the commencement of the war. I might spare myself the consideration of the question as to *debts*; but, as it

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has been ably argued, I will submit some views respecting it, because they will illustrate and confirm the doctrine applicable to goods. It seems conceded, and indeed is quite too clear for argument, that, in former times, the right to confiscate *debts* was admitted as a doctrine of national law. It had the countenance of the civil law. (*Dig. lib.* 41. *tit.* 1.—*id. lib.* 49, *tit.* 15,)—of *Grotius*, (*De jure belli et pacis, lib.* 3, *ch.* 2, § 2, *ch.* 6. § 2 *ch.* 7, § 3 *and* 4, *ch.* 13, § 1, 2.)—of *Puffendorf*, (*De jure Nat. et Nat. lib.* 8, *ch.* 6. § 23,)—and lastly of *Bynkershoek*; (*Quæst. Pub. Juris, lib.* 1, *ch.* 7,) who is himself of the highest authority, and pronounces his opinion in the most explicit manner. Down to the year 1737, it may be considered as the opinion of jurists that the right was unquestionable. It is, then, incumbent on those who assume a different doctrine, to prove that, since that period, it has by the general consent of nations, become incorporated into the code of public law. I take upon me to say that no jurist of reputation can be found who has denied the right of confiscation of enemies debts. *Vattel* has been supposed to be the most favorable to the new doctrine. He certainly does not deny the right to confiscate; and if he may be thought to hesitate in admitting it, nothing more can be gathered from it than that he considers that, in the present times, a relaxation of the rigor of the law has been in practice among the sovereigns of Europe. *Vattel, lib.* 3, *ch.* 5, § 77. Surely a relaxation of the law in practice cannot be admitted to constitute an abolition in principle, when the principle is asserted, as late as 1737, by Bynkershoek, and the relaxation shewn by Vattel in 1775. In another place, however, Vattel, speaking on the subject of reprisals, admits the right to seize the property of the nation or its subjects by way of reprisal, and, if war ensues, to confiscate the property so seized. The only exception he makes, is of property which has been deposited in the hands of the nation, and intrusted to the public faith; as is the case of property in the public funds. *Vattel, lib.* 2, *ch.* 18, § 342, 343, 344. The very exception evinces pretty strongly the opinion of Vattel as to the general rule. Of the character of Vattel as a jurist, I shall not undertake to express an opinion. That he has great merit is conceded; though a learned civilian, sir James Mac Intosh, informs us that he has fallen into great mistakes in important "practical discussions of public law."

Discourse on the law of nations, p. 32, note. But if he is singly to be opposed to the weight of Grotius and Pufendorf, and, above all, Bynkershoek, it will be difficult for him to sustain so unequal a contest. I have been pressed with the opinion of a very distinguished writer of our own country on this subject.—*Camillus, No. 18 to 23, on the British treaty of 1794.* I admit, in the fullest manner, the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure not as of strict right, but as of sound policy and national honor, I have no hesitation to say that the argument is unanswerable. He proves incontrovertibly what the highest interest of nations dictates with a view to permanent policy: but I have not been able to perceive the proofs by which he overthrows the ancient principle. In respect to the opinion of Grotius, quoted by him in No. 20, as indicating a doubt by Grotius of his own principles, I cannot help thinking that the learned writer has himself fallen into a mistake. Grotius, in the place referred to, lib. 3, ch. 20, § 16, is not adverting to the right of confiscation, but merely to the general results of a treaty of peace. He says (§ 15,) that, after a peace, no action lies for damages done in the war; but (§ 16,) that debts due before the war are not, by the mere operations of the war, *released*, but remain suspended during the war, and the right to recover them revives at the peace. It is impossible to doubt the meaning of Grotius, when the preceding and succeeding sections are taken in connexion. Grotius, therefore, is not inconsistent with himself, nor is "Bynkershoek more inconsistent;" for the latter explicitly avows the same doctrine, but considers it inapplicable to debts confiscated during the war; for these are completely extinguished. *Bynk. Quæst. Pub. Juris, ch. 7.*

It is supposed by the same learned writer, that the principle of confiscating debts had been abandoned for more than a century. That the practice was intermitted, is certainly no very clear proof of an abandonment of the principle. Motives of policy and the general interests of commerce may combine to induce a nation not to inforce its strict rights, but it ought not therefore to be construed to release them. It may, however, be well doubted if the practice is quite so uniform as it is suppo-

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sed. The case of the Silesia loan, which exercised the highest talents of the English nation, is an instance to the contrary, almost within half a century, (in 1752,) In the very elaborate discussions of national law to which that case gave birth, there is not the slightest intimation that the law of nations prohibited a sovereign from confiscating debts due to his enemies, even where the debts were due from the nation; though there is a very able statement of its injustice in that particular case: and the English memorial admits that when sovereigns or states borrow money from foreigners, it is very commonly expressed in the contract, that it should not be seized as reprisals, or in case of war. Now it strikes me that this very circumstance shews in a strong light the general opinion as to the ordinary right of confiscation. The stipulations of particular treaties of the United States have been cited, in corroboration of their general doctrine, by the claimant's counsel. These treaties certainly shew the opinion of the government as to the impolicy of enforcing the right of confiscation against debts and actions. See *treaty with Great Britain*, 1794, *art.* 10—*with France* 1778, *art.* 20—*with Holland*, 8*th October* 1782, *art.* 18—*with Prussia*, 11*th July* 1799, *art.* 23—*with Morocco*, 1787, *art.* 24—But I cannot admit them to be evidence for the purpose for which they have been introduced. It may be argued with quite as much if not greater force, that these stipulations imply an acknowledgement of the general right of confiscation, and provide for a liberal relaxation between the parties. I hold, with Bynkershoek, (*Quæst. Pub. Jur. ch.* 7.) that where such treaties exist, they must be observed; where there are none, the general right prevails. It has been further supposed, that the common law of England is against the right of confiscating debts; and the declaration of *Magna Charta*, ch. 30, has been cited to shew the liberal views of the British constitution. This declaration, so far as is necessary to the present purpose, is as follows: "If they" (i. e. foreign merchants,) "be of a land making war against us, and be found in our realm at the beginning of the war, they shall be attached without harm of body or goods (*rerum*) until it be known unto us, or our chief justice, how our merchants be entreated, then in the land making war against us, and if our merchants be well entreated there, theirs shall be likewise with us." I

quote the translation of *lord Coke*, (2, *Just.* 27.)—This would certainly seem to be a very liberal provision; and if its true construction applied to all property and persons, as well transiently in the country as domiciled and fixed there, it would certainly be entitled to all the encomiums which it has received. *Montesq. Spirit of Laws, lib. 20, ch. 14.* How far it is now considered as binding, in relation to vessels and goods found within the realm at the commencement of the war, I shall hereafter consider. It will be observed, however, that this article of *Magna Charta*, does not protect the debts or property of foreigners who are *without the realm*: it is confined to foreigners *within* the realm upon the public faith on the breaking out of the war. Now it seems to be the established rule of the common law, that all *choses in action*, belonging to an enemy, are forfeitable to the crown; and that the crown is at liberty, at any time during the war, to institute a process, and thereby appropriate them to itself. This was the doctrine of the year books, and stands confirmed by the solemn decision of the exchequer, in *the Attorney General v. Weeden, Parker Rep. 267. —Maynard's Edw. 2, cited ibid.*—It is a prerogative of the crown which, I admit, has been very rarely enforced; (See *lord Alvanley's* observations in *Furtado v. Rodgers*, 3, *Bos. and Pul.* 191,) but its existence cannot admit of a legal doubt. On a review of authorities, I am entirely satisfied that, by the rigor of the law of nations and of the common law, the sovereign of a nation may lawfully confiscate the debts of his enemy, during war, or by way of reprisal: and I will add, that I think this opinion fully confirmed by the judgement of the Supreme Court in *Ware v. Hylton*, 3, *Dall.* 199, where the doctrine was explicitly asserted by some of the judges, reluctantly admitted by others, and denied by none.

In respect to the *goods* of an enemy found within the dominions of a belligerent power, the right of confiscation is most amply admitted by Grotius, and Puffendorf, and Bynkershoek, and Burlamaqui, and Rutherforth and Vattel. *See Grotius*, and *Puffendorf*, and *Bynkershoek ubi supra;* and *Bynk. Qu. Pub. Jur. c. 4*, and 6. 2, *Burlam. p.* 209, *sec.* 12, *p.* 219, *sec.* 2, *p.* 221, *sec.* 11. *Ruth. lib.* 2, *c.* 9, *p.* 558 *to* 573. Such, also, is the rule of the common law. *Hale* in *Harg. law tracts, p.* 245, *c.* 18. *Vattel* has indeed contended (and

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in this he is followed by *Azuni, Part. 2, ch. 4, art. 2, sec. 7,*) that the sovereign declaring war, can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration, because they came into the country upon the public faith. This exception (which, in terms, is confined to the property of persons who are within the country,) seems highly reasonable in itself, and is an extension of the rule in *Magna Charta.* But, even limited as it is, it does not seem followed in practice; and Bynkershoek is an authority the other way *Bynk. Quæst. Pub. Jur. c. 2, 3, 7.* In England, the provision in *Magna Charta* seems, in practice, to have been confined to foreign merchants domiciled there; and not extended to others who came to ports of the realm for occasional trade. Indeed, from the language of some authorities, it would seem that the clause was inserted, not so much to benefit foreign merchants, as to provide a remedy for their own subjects, in cases of hostile injuries in foreign countries. (See the opinion of Ch. J. *Lee* in *Key v. Pearse,* cited *Doug. 606, 607.*) However this may be, it is very certain that Great Britain has uniformly seized, as prize, all vessels and cargoes of her enemies found afloat in her ports at the commencement of war. Nay, she has proceeded yet farther, and, in contemplation of hostilities, laid embargoes on foreign vessels and cargoes, that she might, at all events, secure the prey. It cannot be necessary for me to quote authorities on this point. In the articles respecting the *droits of admiralty* in 1665, there is a very formal recognition of the rights of the crown to all vessels and cargoes seized before hostilities. *The Rebeckah, 1, Rob. 227,* and *id. 230, note (a.)* This exercise of hostile right—of the *summum jus,* is so far, indeed, from being obsolete, that it is in constant operation, and, in the present hostilities, has been applied to the property of the citizens of the United States. Of a similar character, is the detention of American seamen found in her service at the commencement of the war, as prisoners of war; a practice which violates the spirit, though not the letter, of *Magna Charta;* and, certainly, can, in equity and good faith, find few advocates. Of the right of Great Britain thus to seize vessels and cargoes found in her ports on the breaking out of war, I do not find any denial in authorities which are

entitled to much weight; and I, therefore, consider the rule of the law of nations to be, that every such exercise of authority is lawful, and rests in the sound discretion of the sovereign of the nation.

The next question is, whether congress (for with them rests the sovereignty of the nation as to the right of making war, and declaring its limits and effects) have authorized the seizure of enemies' property afloat in our ports. The act of 18th June, 1812, ch. 102, is in very general terms, declaring war against Great Britain, and authorizing the president to employ the public forces to carry it into effect. Independent of such express authority, I think that, as the executive of the nation, he must, as an incident of the office, have a right to employ all the usual and customary means acknowledged in war, to carry it into effect. And there being no limitation in the act, it seems to follow that the executive may authorize the capture of all enemies' property, wherever, by the law of nations, it may be lawfully seized. In cases where no grant is made by congress, all such captures, made under the authority of the executive, must enure to the use of the government. That the executive is not restrained from authorizing captures on land, is clear from the provisions of the act. He may employ and actually has employed the land forces for that purpose; and no one has doubted the legality of the conduct. That captures may be made, within our own ports, by commissioned ships, seems a natural result of the language—of the generality of expression in relation to the authority to grant letters of marque and reprisal to private armed vessels, which the act does not confine to captures on the high seas, and is supported by the known usage of Great Britain in similar cases. It would be strange indeed, if the executive could not authorize or ratify a capture in our own ports, unless by granting a commission to a public or private ship. I am not bold enough to interpose a limitation where congress have not chosen to make one; and I hold, that, by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved. It will be at once perceived, that in this doctrine I do not mean to include the right to confiscate debts due to enemy subjects. This, though a strictly

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national right, is so justly deemed odious in modern times, and is so generally discountenanced, that nothing but an express act of congress would satisfy my mind that it ought to be included among the fair objects of warfare; more especially as our own government have declared it unjust and impolitic. But if congress should enact such a law, however much I might regret it, I am not aware that foreign nations, with whom we have no treaty to the contrary, could, on the footing of the rigid law of nations, complain, though they might deem it a violation of the modern policy.

On the whole, I am satisfied that congress have authorized a seizure and condemnation of enemy property found in our ports under the circumstances of the present case. And the executive may lawfully authorize proceedings to enforce the confiscation of the same property before the proper tribunals of the United States. The district attorney is, for this purpose, the proper agent of the executive and of the United States. From the character and duties of his station, he is bound to guard the rights of the United States, and to secure their interests. Whenever he choses to institute proceedings on behalf of the United States, it is presumed by Courts of law that he has the sanction of the proper authorities; and that presumption will avail, until the executive or the legislature disavow the proceedings, and sanction a restoration of the property.

I have taken up more time than I originally intended, in discussing the various subjects submitted in the argument. An apology will be found in their extraordinary importance. If I shall have successfully shewn that the principles of prize law, as admitted in England and in the United States, have the sanction of the principles of public law and public jurists, I shall not regret the labor that has been employed, although, in this particular case, I may pronounce an erroneous sentence.

I reverse the decree of the district Court, and condemn the 550 tons of timber to the United States; subject, however, to the right of the owners of the *Emulous* to a reimbursement of their actual charges and expenses for the custody of the property, which I shall reserve for further consideration; and I shall order the said

property to be sold, and the proceeds brought into Court to abide the further order of the Court."

Such is the opinion which I had the honor to pronounce in the Circuit Court; and upon the most mature reflection, I adhere to it. The argument in this Court, urged on behalf of the Claimant, has put in controversy the same points which were urged before me. But as the opinion of this Court admits many of the principles for which I contended, I shall confine my additional remarks to such as have been overruled by my brethren.

It seems to have been taken for granted in the argument of counsel that the opinion held in the Circuit Court proceeded, in some degree, upon a supposition that a declaration of war operates *per se* an *actual confiscation* of enemy's property found within our territory. To me this is a perfectly novel doctrine. It was not argued, on either side, in the Circuit Court, and certainly never received the slightest countenance from the Court. I disclaim, therefore, any intention to support a doctrine which I always supposed to be wholly untenable. I go yet further, and admit that a declaration of war does not, of itself, import a confiscation of enemies' property within or without the country, on the land or on the high seas. The title of the enemy is not by war divested, but remains *in proprio vigore*, until a hostile seizure and possession has impaired his title. All that I contend for is, that a declaration of war gives a right to confiscate enemies' property, and enables the power to whom the execution of the laws and the prosecution of the war are confided, to enforce that right. If, indeed, there be a limit imposed as to the extent to which hostilities may be carried by the executive, I admit that the executive cannot lawfully transcend that limit; but if no such limit exist, the war may be carried on according to the principles of the modern law of nations, and enforced when, and where, and on what property the executive chooses.

In no act whatsoever, that I recollect, have congress declared the confiscation of enemies' property. They have authorized the president to grant letters of marque and general reprisal, which he may revoke and annul

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at his pleasure: and even as to captures actually made under such commissions, no absolute title by confiscation vests in the captors, until a sentence of condemnation. If, therefore, British property had come into our ports since the war, and the president had declined to issue letters of marque and reprisal, there is no act of congress which, in terms, declares it confiscated and subjects it to condemnation. If, nevertheless, it be confiscable, the right of confiscation results not from the express provisions of any statute, but from the very state of war, which subjects the hostile property to the disposal of the government. But until the title should be divested by some overt act of the government and some judicial sentence, the property would unquestionably remain in the British owners, and if a peace should intervene, it would be completely beyond the reach of subsequent condemnation.

There is, then, no distinction recognized by any act of congress, between enemies' property which was within our ports at the commencement of war, and enemies' property found elsewhere. Neither are declared *ipso facto* confiscated; and each, as I contend, are merely confiscable.

I will now consider what, in point of law, is the operation of the acts of Congress made in relation to the present war.

The act of 18th June, 1812, ch. 102, declares war to exist between Great Britain and the United States, and authorizes the president of the United States to use the land and naval force of the United States to carry the same into effect; and further authorizes him to issue letters of marque, &c. to private armed vessels, against the vessels, goods and effects of the government of Great Britain and the subjects thereof.

The prize act of 26th June, 1812, ch. 107, confers the power on the president to issue instructions to private armed vessels, for the regulation of their conduct. The act of 6th July, 1812, ch. 128, authorizes the president to make regulations, &c. for the support and exchange of prisoners of war. The act of 6th July, 1812, ch. 129, respecting trade with the enemy, authorizes the presi-

dent to grant passports for the property of British subjects within the limits of the United States during the space of six months, and protects certain British packets, &c. with despatches, from capture. The act of 3d March, 1813, ch. 203. vests in the president the power of retaliation for any violation of the rules and usages of civilized warfare by Great Britain.

These are all the acts which confer powers, or make provisions touching the management of the war. In no one of them is there the slightest limitation upon the executive powers growing out of a state of war; and they exist, therefore, in their full and perfect vigour. By the constitution, the executive is charged with the faithful execution of the laws; and the language of the act declaring war authorizes him to carry it into effect. In what manner, and to what extent, shall he carry it into effect? What are the legitimate objects of the warfare which he is to wage? There is no act of the legislature defining the powers, objects or mode of warfare: by what rule, then, must he be governed? I think the only rational answer is by the law of nations as applied to a state of war. Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; for with him the sovereignty of the nation rests as to the execution of the laws. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion, or he can have none. Upon what principle, I would ask, can he have an implied authority to adopt one and not another? The best manner of annoying, injuring and pressing the enemy, must, from the nature of things, vary under different circumstances; and the executive is responsible to the nation for the faithful discharge of his duty, under all the changes of hostilities.

But it is said that a declaration of war does not, of itself, import a right to confiscate enemies' property found within the country at the commencement of war. I cannot admit this position in the extent in which it is

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laid down. Nothing, in my judgment, is more clear from authority, than the right to seize hostile property afloat in our ports at the commencement of war. It is the settled practice of nations, and the modern rule of Great Britain herself, applied (as appears from the affidavits in this very cause) to American property in the present war; applied, also, to property not merely on board of ships, but to spars floating alongside of them—I forbear, however, to press this point, because my opinion in the Court below contains a full discussion of it.

It is also said that a declaration of war does not carry with it the right to confiscate property found in our country at the commencement of war, because the constitution itself, in giving congress the power "to declare war, grant letters of marque and reprisal, and "make rules concerning captures on land and water," has clearly evinced that the power to declare war did not, *ex vi terminorum*, include a right to capture property every where, and that the power to make rules concerning captures on land and water, may well be considered as a substantive power as to captures of property *within our own territory*. In my judgment, if this argument prove any thing, it proves too much. If the power to make rules respecting captures, &c. be a substantive power, it is equally applicable to all captures, wherever made, on land or on water. The terms of the grant import no limitation as to place; and I am not aware how we can place around them a narrower limit than the terms import. Upon the same construction, the power to grant letters of marque and reprisal is a substantive power; and a declaration of war could not, of itself, authorize any seizure whatsoever of hostile property, unless this power was called into exercise. I cannot, therefore, yield assent to this argument. The power to declare war, in my opinion, includes all the powers incident to war, and necessary to carry it into effect. If the constitution had been silent as to letters of marque and captures, it would not have narrowed the authority of congress. The authority to grant letters of marque and reprisal, and to regulate captures, are ordinary and necessary incidents to the power of declaring war. It would be utterly ineffectual without them. The expression, therefore, of that which is implied in the very nature of the grant, cannot weaken the

force of the grant itself. The words are merely explanatory, and introduced *ex abundanti cautela*. It might be as well contended; that the power "to provide and maintain a navy," did not include the power to regulate and govern it, because there is in the constitution an express provision to this effect. And yet I suppose that no person would doubt that congress, independent of such express provision, would have the power to regulate and govern the navy; and if they should authorize the executive "to provide and maintain a navy," it seems to me as clear that he must have the incidental power to make rules for its government. In truth, it is by no means unfrequent in the constitution to add clauses of a special nature to general powers which embrace them, and to provide affirmatively for certain powers, without meaning thereby to negative the existence of powers of a more general nature. The power to provide "for the common defence and general welfare," could hardly be doubted to include the power "to borrow money;" the power "to coin money," to include the power "to regulate the value thereof;" and the power "to raise and support armies," to include the power "to make rules for the government and regulation" thereof. On the other hand, the affirmative power "to define and punish piracies and felonies committed on the high seas," has never been supposed to negative the right to punish other offences on the high seas; and congress have actually legislated to a more enlarged extent. I cannot therefore persuade myself that the argument against the doctrine for which I contend, is at all affected by any provision in the constitution.

The opinion of my brethren seems to admit that the effect of hostilities is to confer all the rights which war confers; and it seems tacitly to concede, that, by virtue of the declaration of war, the executive would have a right to seize enemies' property which should actually come within our territory during the war. Certainly no such power is given directly by any statute. And if the argument be correct, that the power to make captures on land or water must be expressly called into exercise by congress, before the executive can, even after war, enforce a capture and condemnation, it will be very difficult to support the concession. Suppose a

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British ship of war or merchant ship should now come within our ports, there is no statute declaring such ship actually confiscated. There is no express authority either for the navy or army to make a capture of her; and although the executive might authorize a private armed ship so to do, yet it would depend altogether on the will of the owners of the ship, whether they would so do or not. Can it be possible that the executive has not the power to authorize such seizure? And if he may authorize a seizure by the army or navy, why not by private individuals if they will volunteer for the purpose?

The act declaring war has authorized the executive to employ the land and naval force of the United States, to carry it into effect. When and where shall he carry it into effect? Congress have not declared that any captures shall be made on land; and if this be a substantive power, not included in a declaration of war, how can the executive make captures on land, when congress have not expressed their will to this effect? The power to employ the army and navy might well be exercised in preventing invasion, and in the common defence, without unnecessarily including a right to capture, if the right to capture be not an incident of war: and upon what ground, then, can the executive plan and execute foreign expeditions or foreign captures? Upon what ground can he authorize a Canadian campaign, or sieze a British fort or territory, and occupy it by right of capture and conquest I am utterly at a loss to perceive, unless it be that the power to carry the war into effect, gives every incidental power which the law of nations authorizes and approves in a state of war. I am at a loss to perceive how the power exists, to seize and capture enemy's property which was without our territory at the commencement of the war, and not the power to seize that which was within our territory at the same period. Neither are expressly given nor denied (except as to private armed ships,) and how can either be assumed except as an incident of war, acknowledged upon national and public principles? It may be suggested that the executive, "as commander in chief of the army and navy," has the power to make foreign conquests. But this is utterly inadmissible, if the right to authorize captures resides as a substantive power in con-

gress, and does not follow as an incident of a declaration of war: and certainly the rights of the "commander in chief" must be restrained to such acts as are allowed by the laws. Besides, the same difficulty meets us here as in the former case; if his powers, as commander in chief, authorize him to make captures without the territory, why not within the territory?

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The acts respecting alien enemies and prisoners of war, have been supposed, even in a state of *actual* war, to confer new powers on the executive. I cannot accede to the inference in the extent to which it is claimed. In general, these acts may be deemed mere regulations of war, limiting and directing the discretion of the executive; and it cannot be doubted that Congress had a perfect right to prescribe such regulations. To regulate the exercise of the rights of war as to enemies, does not, however, imply that such rights have not an independent existence. Besides, it is clear that the act respecting alien enemies applies only to aliens resident within the country; and not to the property of aliens, who are not so resident. I might answer, in the same manner, the argument drawn from the act of 6th July 1812, ch. 129, § 4, and the act of 3d of March 1813, ch. 203.—But even admitting that these acts did confer some new powers, still, as these powers do not respect the present case, I cannot consider them as affording even a legislative implication against the existence of the powers for which I contend.

It has been supposed that my opinion assumes for its basis the position, that modern usage constitutes a rule which acts directly on the thing itself by its own force, and not through the sovereign power. Certainly I do not admit this supposition to be correct. My argument proceeds upon the ground, that when the legislative authority, to whom the right to declare war is confided, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty

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as to declaring war and limiting its effects, rests with the legislature. The sovereignty, as to its execution, rests with the president. If the legislature do not limit the nature of the war, all the regulations and rights of general war attach upon it. I do not, therefore, contend that modern usage of nations constitutes a rule acting on enemies' property, so as to produce confiscation of itself, and not through the sovereign power: on the contrary, I consider enemies' property in no case whatsoever confiscated by the mere declaration of war; it is only liable to be confiscated at the discretion of the sovereign power having the conduct and execution of the war. The modern usage of nations is resorted to merely as a limitation of this discretion, not as conferring the authority to exercise it. The sovereignty to execute it is supposed already to exist in the president, by the very terms of the constitution: and I would again ask, if this general power to confiscate enemies' property does not exist in the executive, to be exercised in his discretion, how is it possible that he can have authority to seize and confiscate any enemies' property coming into the country since the war, or found in the enemies' territory?—Yet I understood the opinion of my brethren to proceed upon the tacit acknowledgement that the executive may seize and confiscate such property, under the circumstances which I have stated.

On the whole, I am still of opinion that the judgment of the Circuit Court was correct and ought to be affirmed.

It is due, however, to myself to state, that, at the trial in the Circuit Court, it was agreed that the timber had always been afloat on tide waters; and the affidavit by which it is proved to have rested on land at low tide, was not taken until after the hearing and decision of the cause.

In the opinion which I have expressed I am authorized to state that I have the concurrence of one of my brethren.

THE RAPID, PERRY, MASTER.

THIS was an appeal from the sentence of the Circuit Court, for the District of Massachusetts.

After a declaration of war, an American citizen cannot lawfully send a vessel to the enemy's country to bring away his property.

The material facts in the case were these.

Jabez Harrison, a native American citizen, the Claimant and Appellant in this case, had purchased a quantity of English goods in England, before the declaration of war by the United States against that country, and deposited them on a small island belonging to the English, called Indian island, and situated near the line between Nova Scotia and the United States. Upon the breaking out of the war, Harrison's agents in Boston hired the Rapid, a vessel licensed and enrolled for the cod fishery, to proceed to the place of deposit and bring away the goods. The Rapid accordingly sailed from Boston on the 3d of July, 1812, with Harrison, the Claimant, on board, proceeded to Eastport, where Harrison was left, and from thence, agreeably to Harrison's orders, to Indian island, where the cargo in question was taken on board. On the 8th of July, while on her return, she was captured by the Jefferson privateer, on the high seas, and brought into Salem. The goods, being libelled as prize, and claimed by Harrison as his property, were condemned, in the Circuit Court of Massachusetts, to the captors, on the ground that by "*trading with the enemy*," they had acquired the character of enemies' property.

A claim was also interposed by the United States, on the ground of a violation, by the Rapid, of the non-intercourse act. This claim was also rejected. From the decree of the Circuit Court the United States and Harrison appealed.

HARPER, *for Harrison.*

The ground of condemnation, in the Circuit Court, of the goods in question, was, that *trading with the enemy* made them enemies' property. But we contend that, in this case, there was no *trading with the enemy.*

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Trading is a commercial contract or a series of contracts of sale. Contract is of the essence of trading. But no commercial transaction of this kind took place between Harrison and *the enemy*. The contract, in the present case, was made, the goods were purchased and paid for *before* the declaration of war; consequently, when the British were *friends*. Here was merely a case of removal by Harrison of his own property from the enemies' country to this, it was the simple exercise of an act of ownership, an act which surely does not invest the property with a hostile character.

Every citizen has a right, on the breaking out of a war, to withdraw his property, purchased before the war, from the enemy's country and remove it to his own; and it is certainly the interest of the community to permit such removal.

The cargo, therefore, being American property, neither the declaration of war nor the commission of the privateer authorized the capture.

But this case does not rest on general principles alone. In the case of *Hallet v. Jenks*, 3, *Cranch*, 210, the actual purchase of a cargo in a French port was decided by this Court to be no violation of the non-intercourse act of 13th June, 1798, a case much stronger than the present. Congress, also, has given a very different construction to transactions of this kind by the act of 27th February, 1813, (*laws U. S. vol* 11, *p.* 288,) remitting the forfeitures which had accrued under the non-intercourse act of March 1st, 1809. *Laws U. S. vol. 9, p. 243.*

The claim of the United States will not, at this time, be interposed.*

PITMAN, *contra*, contended,

1. That it appearing, on the face of Harrison's claim, that the property in question was put on board the Rapid in violation of the laws of the United States, he can

* This claim was subsequently, during the same term, revived, and an argument had thereupon. The decision of the Court will be found in the opinion delivered March 15th, in the case of the Sally.

have no standing in Court for the purpose of claiming the same.

In support of this point he cited the following cases. *2 Rob. 77. The Walsingham Packet.—5 Rob. 28, 32. The Cornelis and Maria.—6 Rob. 348. The Recovery.*

2. That all intercourse with the enemy being illegal, the vessel and cargo in question are subjected to confiscation as prize. The following cases were cited as going to establish this point *Duponceau's Bynkershoek p. 24. 5 Rob. 224, 253, 4. The Abby.—4. 302. The Jonge Cassini.—1 Rob. 208. 248. The Odin.—id. 178, 212. Case of the Fortund, cited in the case of the Hoop.—Edwards' Adm. Rep. 32. The Comet.—1 Rob. 76. The Santa Cruz.—id. 196. The Hoop.—id. 74, 89. The Ringende Jacob.—1 Bos. and Pul. 349. Case of the Louisa Margaretha. cited in Bell v. Gibson.—8 T. R. 556. Case of St. Philip, cited in Potts v. Bell.—id. 561. Lord Kenyon's opinion.—3 Rob. Apx. B. p. 7, 294. The Angelique.—4 Rob. 289, 355. The Venus.—id. 206, 251. The Nayade.—1 Rob. 126, 150. The Vrow Judith.—id. 78, 93. The Betsey.—id. 141, 170. The Neptunus.—id. 184. 219. Case of the Nelly cited in note to the case of the Hoop.—4 Rob. 161. 195. Madonna delle Gracie.—5 Rob. 141. Juffrow Catharina.*

PINKNEY, *on the same side.*

By the constitution of the United States, congress has power to declare war. War, in the present case, had been declared. After knowledge of the declaration of war, the Claimant fitted out a vessel to go to the enemies' country to bring away his property. The voyage was accordingly prosecuted, and the property brought away. By this intercourse with the enemy the vessel and cargo are to be considered as having adhered to the enemy, and as being, *pro hac vice*, hostile.

With regard to the general principle, that trade with an enemy is illegal, there can be no doubt: the principle is recognized by the common law and by the maritime codes of all the European nations. By these laws all intercourse with an enemy, not sanctioned by the sovereign power, is prohibited. This principle is founded on the strongest reasons. Without this sanc-

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tary provision, what a wide door would be opened for every species of treasonable intercourse. The English authorities are almost omnipotent on this subject. *Vid.* 8, *T. R.* 554, *Potts v. Bell. Sir J. Nicholl's argument*, and the cases there cited. Many of these authorities are judicial decisions in cases which occurred before the revolution. The principle contended for was therefore brought over, before that time, by the English emigrants to this country, and is consequently to be considered of equal force here as in England.

The doctrine, then, may be considered as established.

The voyage, in this case, was undertaken by Harrison with full knowledge of the war—against his double duty—in violation both of the non-importation act and of the rights of war.

But the Appellants have attempted to take a distinction between a purchase made *before* the declaration of war and a purchase made *since*; and they contend that, as the purchase, in the present case, was made previous to the declaration of war, the property is not liable to confiscation, no *trading* having been carried on with the *enemy*. But all the cases on this subject condemn such a distinction. *Any commercial intercourse with the enemy is trading*, within the meaning of the term as used in prize law; and that, for the very obvious reason before assigned, viz: that if commercial intercourse of any kind were permitted, it would facilitate the means of carrying on a traiterous correspondence.

The case of *Hallet v. Jenks*, 3, *Cranch*, 210, cited by the Appellants, was a case of clear compulsion. The transaction in the present case was perfectly voluntary.

HARPER, *in reply.*

No case has been cited by the Claimant's counsel, in which there was not a trading with the enemy. Here, we contend, there was none. In the case of *Escott*, cited in the case of *the Hoop*, 1, *Rob.* 182, the goods were the product of a trade long carried on, and shipped under fictitious names. *Here* they were shipped openly. No circumstances of suspicion attended the transaction.

In some of the cases cited, part of the goods were purchased after the declaration of war. All the cases cited are either new acts of trade, or a continuation of trade in the regular course of employment of the parties, and are also attended with circumstances of suspicion.

The mere act of going into the enemies' country is not illegal. Any man may go thither at any time, if the enemy will permit him. He violates no law of his own country by so doing. Those laws prohibit commercial intercourse only; and that, not because it gives an opportunity of affording information to the enemy and opens a door for the commission of traiterous practices, but because such prohibition is rendered necessary by the modern mode of warfare, which is intended to affect the enemy through his commerce. The principle and object of the rule, therefore, are not applicable to this case. The rule is confined to commercial transactions and commercial objects. If facility of treasonable intercourse were the reason on which the prohibition is founded, it would operate to prevent our citizens from going to the frontiers, or even towards them, an operation which was surely never intended to be given it. The question to be considered in every case of this nature is this: has the privilege of going to the enemies' country been applied to improper purposes?

Monday, March 7th. *Absent*....TODD, *J.*

JOHNSON, *J.* delivered the opinion of the Court as follows:

This capture was made on the high seas, about a month after the declaration of war. The Claimant, Harrison, had purchased a quantity of English goods in England, "a long time," to use his own language, before the declaration of war, and deposited them on a small island, called Indian island, near to the line between Nova Scotia and these states. Upon the breaking out of the war, his agents in Boston hired the Rapid, a licensed vessel in the cod-fishery, to proceed to the place of deposit and bring away these goods. On her return, she was captured by the Jefferson privateer, and was condemned for trading with the enemy's country.

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On the argument, it was contended, in behalf of the Appellant, that this was not a trading within the meaning of the cases cited to support the condemnation; that, on the breaking out of a war, every citizen had a right, and it was the interest of the community to permit her citizens, to withdraw property lying in an enemy's country and purchased before the war; finally, that neither the declaration of war, nor the commission of the privateer authorized the capture of this vessel and cargo, as they were, in fact, American property.

It is understood that the claim of the United States for the forfeiture is not now interposed. The Court, therefore, enters upon this consideration unembarrassed by a claim which would otherwise ride over every question now before us.

This is the first case, since its organization, in which this Court has been called upon to assert the rights of war against the property of a citizen. It is with extreme hesitation, and under a deep sense of the delicacy of the duty which we are called upon to discharge, that we proceed to adjudge the forfeiture of private right, upon principles of public law highly penal in their nature, and unfortunately too little understood.

But a new state of things has occurred—a new character has been assumed by this nation, which involves it in new relations, and confers on it new rights; which imposes a new class of obligations on our citizens, and subjects them to new penalties.

The nature and consequences of a state of war must direct us to the conclusions which we are to form on this case.

On this point there is really no difference of opinion among jurists: there can be none among those who will distinguish between what it is in itself, and what it ought to be under the influence of a benign morality and the modern practice of civilized nations.

In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who com-

pose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat.

War strips man of his social nature; it demands of him the suppression of those sympathies which claim man for a brother; and accustoms the ear of humanity to hear with indifference, perhaps exultation, "that thousands have been slain."

These are not the gloomy reveries of the bookman. From the earliest time of which historians have written or poets imagined, the victor conquered but to slay, and slew but to triumph over the body of the vanquished. Even when philosophy had done all that philosophy could do to soften the nature of man, war continued the gladiatorian combat: the vanquished bled wherever caprice pronounced her fiat. To the benign influence of the Christian religion it remained to shed a few faint rays upon the gloom of war; a feeble light but barely sufficient to disclose it horrors. Hence, many rules have been introduced into modern warfare, at which humanity must rejoice, but which owe their existence altogether to mutual concession, and constitute so many voluntary relinquishments of the rights of war. To understand what it is in itself, and what it is under the influence of modern practice, we have but too many opportunities of comparing the habits of savage, with those of civilized warfare.

On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country. It is not necessary to quote the authorities on this subject; they are numerous, explicit, respectable, and have been ably commented upon in the argument.

But, after deciding what is the duty of the citizen, the question occurs, what is the consequence of a breach of that duty?

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The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate of the property of the belligerent, and of the property found engaged in anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.

This liability of the property of a citizen to condemnation as prize of war, may be likewise accounted for under other considerations. Every thing that issues from a hostile country is, *prima facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen or an ally at the same time that he makes out his interest, he confesses the commission of an offence which, under a well known rule of the civil law, deprives him of his right to prosecute his claim.

This doctrine, however, does not rest upon abstract reason. It is supported by the practice of the most enlightened (perhaps we may say of all) commercial nations. And it affords us full confidence in our decision, that we find, upon recurring to the records of the Court of appeals in prize cases established during the revolutionary war, that, in various cases, it was reasoned upon as the acknowledged law of that Court. Certain it is that it was the law of England before the revolution, and therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this Court in pursuance of the constitution.

After taking this general view of the principal doctrine on this subject, we will consider the points made in behalf of the claimant in this case, and,

1. Whether this was a trading, in the eye of the prize law, such as will subject the property to capture?

The force of the argument on this point, depends upon the terms made use of. If by *trading*, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy and spirit of the rule is to cut off all communication or actu-

al locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connexion with the offence. *Intercourse* inconsistent with actual *hostility*, is the offence against which the operation of the rule is directed: and by substituting this definition for that of *trading with an enemy*, an answer is given to this argument.

2. Whether, on the breaking out of a war, the citizen has a right to remove to his own country with his property, is a question which we conceive does not arise in this case. This claimant certainly had not a right to leave the United States for the purpose of bringing home his property from an enemy country; much less could he claim it as a right to bring into this country goods, the importation of which was expressly prohibited. As to the claim for the vessel, it is founded on no pretext whatever; for the undertaking, besides being in violation of two laws of the United States, was altogether voluntary and inexcusable. With regard to the importations from Great Britain about this time, it is well known that the forfeiture was released on grounds of policy and a supposed obligation induced by the assurances which had been held out by the American charge d'affaires in England. But this claimant could allege no such excuse.

3. On the third point, we are of opinion that the foregoing observations furnish a sufficient answer.

If the right to capture property thus offending, grows out of the state of war, it is enough to support the condemnation in this case, that the act of congress should produce a state of war, and that the commission of the privateer should authorize the capture of any property that shall assume the belligerent character.

Such a character we are of opinion this vessel and cargo took upon herself; or at least, she is deprived of the right to prove herself otherwise.

We are aware that there may exist considerable hardship in this case; the owners, both of vessel and cargo, may have been unconscious that they were violating the duties which a state of war imposed upon them. It does not appear that they meant a daring violation eith-

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er of the laws or belligerent rights of their country. But it is the unenvied province of this Court to be directed by the head, and not the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling.

Friday, March 11th.

The claim of the United States was taken up.

RUSH, *Attorney General.*

The United States claim the property in question, as a forfeiture under the non-intercourse act of 1st March, 1809. This act was in force at the breaking out of the war, and still continued in force at the time of the capture of the Rapid. The 6th section of the act declares the prohibited goods liable to forfeiture immediately on being *shipped* with intention of importing the same into the United States. The United States do not claim in any case but where the vessel was unquestionably bound and sailing to the United States, and when no force was necessary to bring her in. When such a vessel actually arrives in a port of the United States, the intent is not only evidenced, but carried into effect, and the offence is complete.

The arrival, in this case, must be taken as a voluntary coming into port. For as the Rapid was bound to the United States previous to the capture, the intervention of the privateer was immaterial, and cannot be considered as rendering the arrival involuntary. The commencement of the illegal act was at the time of the shipment, and was prior to any forfeiture under belligerent rights. The forfeiture under the non-intercourse act, therefore, relates back to the inception of the offence. The municipal law, we contend, abrogated the *jus belli, pro tanto.*

It is true that, by the 14th section of the prize act of 26th June, 1812, (*laws U. S. vol.* 11, *p.* 238,) provision is made for the importation of British goods captured from the enemy and made good and lawful prize of war; and it is admitted that such goods are forfeited and accrue to the captors; but the question recurs, what is

good and lawful prize of war? Not, we contend, American property in an American bottom coming to the United States, as in the present case.

By the 16th section of the same act, the act of 4th of April, 1812, laying an embargo, and the non-exportation act of the 14th of the same month, are repealed so far as they relate to ships and vessels having commissions or letters of marque and reprisal. It was equally necessary that there should be an express repeal of the non-intercourse act.

By the act of 2d January, 1813, (*laws U. S. vol.* 11, *p.* 341,) directing the secretary of the treasury to remit fines, forfeitures and penalties in certain cases, property shipped and departing from Great Britain between the 23d of June and 15th of September, and forfeited, under the non-intercourse acts, to the United States, is to be restored to the owners: no notice is taken of any claim of the captors. The plain inference is, that the legislature did not suppose that any claim existed on the part of the captors. The same inference may be drawn from the act of 27th February, 1813, (*laws U. S. vol.* 11. *p.* 388.)

The sovereign is not to be deprived of his rights by implication. Where the rights of the sovereign clash with those of a private individual, the rights of the latter must yield to those of the former. 2 *Cranch*, 358. *Fisher v. Blight.—Plowd. fo.* 253. *Hales v. Petit.* This last is a leading case on this point.

From the act of 13th July, 1813, (*laws U. S. vol.* 12, *p.* 14,) it is clearly to be inferred, that, previous to the passage of that act, the rights of the captors were considered as being merged in the forfeiture under the non-intercourse acts. The act of July has merely suspended the right of the United States.

PITMAN, *contra, for the captors.*

We do not claim adversely to the United States, but under the United States, as grantees. We were authorized by our commission to capture this vessel, and, upon capture, it was forfeited to us: condemnation, we

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contend, is not necessary to give us title: our title accrued at the moment of capture. The United States relinquished to us their right by the 4, § of the prize act.

The non-intercourse act had reference solely to time of peace.

The property in question could not be forfeited to the United States, merely by being put on board; for a municipal law can only have a municipal operation; it cannot operate extra-territorially; it can have no effect upon goods in a foreign country, whether that country be hostile or neutral.

Again by the act of *1st March*, 1809, § 8, no persons are authorized to seize property for a violation of that act, except the officers particularly mentioned therein. Until, therefore, a seizure was made by some person so authorized, no forfeiture to the United States could attach: and if, as in the present case, a seizure had been made *jure belli*, no seizure under the municipal act could subsequently be made, until the first was determined. 1 *Rob.* 68, 81. *The Mercurius.*

The non-intercourse act was merged in the declaration of war, as it respected British subjects and American citizens: this property was therefore forfeited to the United States *jure belli*: they had a right to seize it *jure belli*: this right they have granted to us, and our title to the property we have captured must be tried *jure belli*. If this were a municipal seizure, and if the property were British, the British owner would have had a right to come into Court and assert his claim; but this he could not now do, being an alien enemy.

The 2 § *of the act of the 13th July*, 1813, we consider, notwithstanding what has been said by the counsel for the United States, as acknowledging a previous right in the captors.

JONES, *on the same side*, considered,

1st. The law independent of the instructions of the president to privateers.

2d. The instructions themselves.

1st. The United States did not mean to relinquish the broad ground of *jus belli*, as to British property coming to the United States.

The declaration of war and the prize act, being subsequent to the non-intercourse law, are to be considered as having abrogated or superseded that law.

But if this should not be admitted, we contend that these acts may exist together without any inconsistency. There is room enough for the non-intercourse and the prize act both. It has been decided by this Court, that trading with the enemy is, *per se*, a ground of confiscation. There, then, the prize act may operate. But many hostile cargoes may escape capture, and reach the United States. Many such cargoes may be imported by neutrals. Here is room for the operation of the non-intercourse act.

The act of 13th July, 1813, relinquishing to the captors the claims of the United States to the captured property, is conclusive to show that the United States did not mean to relinquish the rights of war. That act describes the property to which the United States give up their claim, as property captured on the high seas, without limitation.

2d. As to the president's instructions. These instructions do not apply to vessels sailing *after* knowledge of the declaration of war.

But we contend that the president, not having the power of war and peace, had no authority to give such instructions: he could only control the privateers by the power he had of revoking their commissions. There is a difference between his power over these vessels and his power over the public armed ships of the U. States.

The prizes taken by privateers under the prize act, are *forfeitures*, and are to be appropriated differently from those captured under the non-intercourse act.

To show that the capture, and not the condemnation,

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is the foundation of the captor's right of property, the Court is referred to 1, *Wils.* 211, *Morrough v. Comyns.*

IRVING, *contra.*

By the 3d section of the prize act, privateers are bound to observe all the laws of the United States. Supposing, therefore, the non-intercourse act to have been in force, *they* had no right to seize for a violation of that act. Besides, the mode of prosecution under the non-intercourse act is essentially different from that directed to be pursued under the prize act. There is also a difference in the manner of distributing the captured property.

PINKNEY. The rights of the captors depend not upon the non-intercourse act. Both that and the prize act may be in force at the same time, and operate on the same thing. The first seizure decides which mode of condemnation, &c. shall be adopted.

HARPER, *in reply.*

There is a distinction between importations made by citizens of the United States, and those made by foreigners. The latter cannot be affected by the non-intercourse act, until the goods have arrived within the United States. They commit no offence till the goods are actually imported. But with regard to citizens of the United States, the case is different. *They* are guilty of a violation of the act by the mere *shipment* of prohibited goods in a foreign country, with intent to import the same into the United States. The law, as to them, has an extra-territorial operation; it binds them wherever they are. By the shipment, therefore, at Indian island with intent to import into the United States, the property in the present case, was immediately forfeited; and the right of the United States to the forfeiture, at that moment became complete.

For the opinion of the Court on the foregoing question, respecting the claim of the United States, under the non-intercourse act, see the opinion in the case of the Sally, delivered by STORY, *J. 15th March, 1814, in which the Court decided in favor of the captors.*

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THIS was an appeal from the sentence of the Circuit Court for the district of Massachusetts.

A vessel, owned by citizens of the United States, sails from Naples, in the year 1812, for the United States, with a cargo and a British license to carry the same to England. On her passage, hearing that war had broken out between Great Britain and the United States, she alters her course for England; is captured by the British, carried into Ireland, libelled, and acquitted upon her license; sells her cargo, and, after a detention of seven months in Ireland, purchases a return cargo in Liverpool, sails for the United States, and is captured by a United States' privateer. Vessel and cargo condemned as prize to the captors. Capture good, though only a prize master put on board

The following were the material facts in the case:

The brig Alexander, William S. Picket, master, sailed from Naples, on the 22d June, 1812, with a cargo of brandy, wine and cream of tartar, with a British license to carry the same from Naples to England. She touched at Gibraltar, and there left her deck-load, consisting of brandy, and sailed from thence for the United States. On the 3d of August, 1812, she received intelligence of the war between the United States and Great Britain, and changed her course for England. She was afterwards captured by the British, and sent into Cork, Ireland, and acquitted, and there disposed of her cargo. After seven months detention in Cork, she proceeded to Liverpool, in ballast. At Liverpool, she took in the cargo in question, purchased by Samuel Welles, one of the Claimants, then in England, from the proceeds of the cargo brought from Naples, and sailed from Liverpool for Boston, May 9th, 1813. On the 2d of June following, she was captured by the privateer America, John Kelew, commander, and libelled, as prize, in the district of Massachusetts.

When the Alexander sailed from Naples, she and her cargo were owned, one half by the Claimants, and the other half by W. and S. Robinson, of New York.

The master, on his examination upon the standing interrogatories, stated that the vessel belonged to J. and S. Welles and W. and S. Robinson.

He also stated that, on his arrival in the United States, he delivered to the chief clerk of J. and S. Welles, of Boston, *bills of lading*, *invoices* and *letters* relating to the *vessel* and *goods*. These papers were never produced by the Claimants.

John Welles, of Boston, claims the vessel and carg

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for himself and Samuel Welles, alleging that Samuel Welles, in London, purchased, on their joint account, of the agent of W. and S. Robinson, their half of the brig and the proceeds of the Naples' cargo, before the purchase of the cargo in question. The United States, also, interposed a claim to the vessel and cargo, as forfeited under the non-importation act.

In the district Court the claim of J. and S. Welles was rejected, and the property condemned to the United States. From this decree the captors and Claimants appealed.

In the Circuit Court the property was condemned to the captors. From this decree the United States and the Claimants appealed.

RUSH, *Attorney General*, stated that it was not the intention of government to interpose.

DEXTER, *for Claimants*.

There being no general rule of the law of nations, that *every* trading with the enemy is unlawful, and there being no municipal law on the subject, an American citizen, surprized abroad by an unexpected war, has a right to use all necessary means to save his property and to secure his return home, provided the means used for that purpose be not inconsistent with the interest of the nation to which he belongs. All the means employed in the present case were necessary to save the property in question: and were so far from being inconsistent with the interest of the United States, that they clearly tended to the national benefit.

That there is no general rule of the law of nations prohibiting all trade with the enemy, is a proposition which probably will not be controverted. Even sir William Scott does not deny the right to withdraw funds, upon the breaking out of a war; he allows that cases of this kind are entitled to be treated with indulgence: he only holds, that if a particular mode of withdrawing funds has been prescribed by the municipal law, as by license, for instance, the person who pursues a different mode is punishable. He has, however, expressly de-

cided, that where circumstances rendered it impossible for the party to obtain a license, there the property shall not be condemned, if it be a case where a license ought to have been granted, if applied for. 2, *Rob.* 264, 322, *the Harmony.* 3, *Rob.* 37, 38, *the Citto.* 5, *Rob.* 90, *the Ocean.* 4, *Rob.* 193, 234, *the Dree Gebroeders.*

No man is bound, on the breaking out of a war, to abandon his property to the enemy; and if no tribunal is established to decide in what cases property shall or shall not be withdrawn, every man must judge for himself.

In the case of *Hallet v. Jenks*, 3, *Cranch.* 210, there was an entire prohibition of trade; a prohibition more complete than any one which results from any provision of the law of nations; yet this Court decided, in that case, that the party being forced into the prohibited port, and obliged by the public authorities of the place to sell, he might purchase a return cargo. In the present case, the captain of the Alexander, hearing of the war and believing it impossible to reach the United States without capture, conceived himself to be under the necessity of changing his course for England, or losing his vessel and cargo; and, having a license, he determined to deceive the enemy. Being captured by a British cruizer and carried into Ireland, he was libelled, but acquitted upon his license. He was compelled to sell his cargo. What was he to do with the proceeds? Suppose he had sold for bank bills—must he bring them to this country? He could not bring specie; it is prohibited. The only way in which he could withdraw his property was to purchase a return cargo and obtain another license. This course he pursued: and we conceive that he was perfectly justified in so doing. The motives for withdrawing his property, after acquitted, were strong, one among others which might be mentioned was the danger that the deception he had practiced upon the enemy would be detected.

2. But allowing, for the sake of argument, that sailing to England after a knowledge of the war, would have been an illegal act—it is clear, in this case, that there was no sailing to England; there was only an *inten-*

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tion to go thither; and it is a well known rule of law that the bare intention to commit an illegal act is not punishable. Again, it cannot be contended that the sailing to Ireland was illegal, as the vessel was forcibly carried in there by the enemy.

3. This is a case, which comes within the additional instruction of the president of the United States to our public and private armed vessels, issued August 28th, 1812. That instruction prohibits the interruption, by our public and private armed vessels, of "any vessels belonging to citizens of the United States, coming from British ports to the United States laden with British merchandize, in consequence of the alleged repeal of the British orders in council." Kehew, the commander of the privateer, had received this instruction.

As to the power of the president to issue such instructions, there can be no doubt. Even if there were no act of Congress relating to the subject, the general power of the executive to direct all hostile operations, gives him the particular power in question. But congress has sanctioned the instruction in question by the proviso contained in the 1st sec. of the act of 13th July, 1813. *Laws U. States, vol. 12, p. 16.*

But it will be said, perhaps, that this instruction is applicable only to vessels sailing from a British port after the repeal of the orders in council, and *before the knowledge of the war.* Such a construction is erroneous. By the act of congress last mentioned it is provided, That nothing in the said act contained shall extend to any capture made by private armed vessels, in violation of the additional instructions of the president of 28th Aug. 1812, after the captor "*shall have been*" apprized thereof. From the use of the phrase, "shall have been," it is clear that the instructions were in force as late as the date of the act of 13th July, i. e. nearly a year after the instructions in question were first given by the president. Government also continued to issue these instructions to the privateers, up to the time of the trial of this cause in the district Court, and afterwards. Now to what vessels coming from a British port and laden with British merchandize, could

those instructions apply which were issued more than a year after the declaration of war? Surely not to vessels which sailed while the orders in council were supposed to be repealed, and which had not heard of the war: it would be absurd to suppose that there were any such, so long after the event had taken place. The instructions, therefore, must be considered as having been originally intended to apply to vessels sailing *with* a knowledge of the war, as well as to those sailing without that knowledge. Again, what was the great object government had in view in issuing these instructions? No doubt to give our citizens an opportunity of withdrawing their property from the enemy's country, and bringing it to the United States. Our citizens had immense funds in England. The whole commercial capital of the United States was there. It was an object of vast importance to get it home; and so long as Great Britain would permit us to withdraw it, it was our interest to afford to our citizens every possible facility in aid of that permission. This was the policy of our government, and this the source of the instructions.

3. This was not a capture *jure belli*. The cruizer was afraid of running the risk of damages for an illegal capture. An understanding was, therefore, had between the parties, which was considered as being mutually beneficial, that the captor should preserve his claim to any British goods which might be found on board, and that the residue should remain to the Claimants. A single man only, not a prize crew, was put on board the Alexander. The prize master alone was utterly unable to secure the vessel against a rescue, should one be attempted. He was utterly unable to bring her into port, without the aid of the hands originally belonging to her. How, then, can it be considered as a capture? But if the Court should finally decide it to be a capture, we shall contend that it was only partial, a capture of the British goods only.

PITMAN, *contra*, contended, on behalf of the captors,

1. That Samuel Welles being in England at the time of the purchase of the cargo, he is to be presumed there *animo manendi*, and is clothed with a British character.

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2. That the suppression of papers connected with the origin of the voyage, affords a sufficient presumption of a concealment of enemy interests, to subject the vessel and cargo to condemnation.

3. That the vessel and cargo, being taken in trade with the enemy, are condemnable to the captors as enemy's property.

As to the *first point*. It appearing that S. Welles was residing in England at the time of the purchase of the property in question, it is incumbent on him to explain the circumstances of his residence there. This has not been done. The presumption, then, must be that he was in England *animo manendi*; that the property was, of course, hostile and liable to condemnation. 1. *Rob.* 87, 103. *The Bernon.*

On the *second point* little need be said. Suppression of papers is always a suspicious circumstance. In the present case it will, no doubt, have its due weight with the Court.

Third point. That here was an actual trading with the enemy, the claimants do not attempt to deny; but they would justify it on the ground of necessity. They say that the vessel was captured by the enemy and carried into Ireland, where she was compelled to sell her cargo, and had no other means of securing the proceeds, but by laying them out in the purchase of British goods. This plea of necessity comes with a very bad grace from the Claimants. If there were any necessity, it was one voluntarily brought upon themselves. They voluntarily, and, as we contend, unnecessarily, placed themselves and their property in the power of the enemy, after a knowledge of the war; and can therefore claim no indulgence on the ground of necessity.

The cases which have been cited in which sir William Scott speaks with indulgence of withdrawing funds, are inapplicable to the present case. Where the withdrawing of funds is spoken of, those funds only are meant which were in the enemy's country before the war; which was not the case here. Besides, the cases cited depend not on *trade* with the enemy, but on *domicil*.

A license to withdraw the property would not have been granted in such a case as the present, in England. The president of the United States, acting on English principles, could not have granted a license, supposing him to have the same power in relation to the subject which the king of England has. But he has no such power. Congress has not invested him with it, though they might have done so; and this Court, it is presumed, will not undertake to say that the present is a case in which a license would have been granted, supposing the president to have possessed the power. No such power, then, having been granted by congress, it is to be presumed that they did not intend there should be any exception to the general rule, that trade with the enemy is unlawful.

But it has been urged that this case comes within the president's instructions of 28th of August, and that this capture, being in violation of those instructions, is void. The vessels contemplated by those instructions are described as vessels coming from British ports, "*in consequence of the alleged repeal of the British orders in council.*" Now it is clear that the Alexander did not sail from the enemy's port in consequence of that alleged repeal; she cannot, therefore, be within the meaning of the instructions.

The delivery of the instructions to cruizers, after the case contemplated by them no longer existed, is quite unimportant, notwithstanding the great stress which has been laid upon that circumstance by the Claimants. The thing is very easily accounted for. The instructions may have continued to be issued through mere inattention: but the counsel for the Claimants, in the explanation which he has attempted, has given to them a construction in direct hostility both with their letter and spirit.....See letter from the secretary of state to Mr. Russel, of August 21, 1812, accompanying the president's message of Dec. 1812.

It has been also contended that there was *no* capture. But here is the property before the Court, and we trust they will not restore it, unless non-capture be fully proved; and even then there can be no restoration unless the Claimants prove their right; which they have not

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yet done. They have produced no title papers, no documents whatever, proving property in themselves.

On this point of non-capture, which was insisted on in the Courts below, the District Court ordered further proof. We contend,

1. That as the preparatory examinations prove a capture, no further proof should have been ordered.

2. That the further proof establishes the fact of the capture.

3. That the proof upon this order offered by the Claimants, was inadmissible, being the depositions of the captain and mate, who were examined *in preparatory*.

As to the putting no prize crew on board, that is a circumstance which in no degree alters the nature of the case; it is not essential to capture. The capture is always made before either a prize master or crew are put on board; and if the circumstances of the captured vessel be such as to do away all apprehension of rescue, and inspire confidence that the crew will bring her into port, there is no reason why the property of the captor may not be retained as well by a prize master alone, as by a considerable crew. The object, in such cases, in putting a prize master on board, is merely to keep possession, and shew that the vessel is not abandoned. 6 *Rob.* 21. *The Resolution.* 4 *Rob.* 316, 386. *The William and Mary.*

PINKNEY, *on the same side.*

If the declaration of war is to be considered as confining captures to property belonging to British subjects, municipally speaking, there is an end of the belligerent rights of the United States upon the ocean. But it is not so to be considered; it is to be construed by the law of nations.

The Claimants seemingly deny that there was any capture in this case; but they in fact contend, not for non-capture, but abandonment. We contend that there was a capture, and that it has not been abandoned. It

was unnecessary to put a prize crew on board to navigate the vessel to the United States, for she was already bound thither. If it was the intention of the captor to abandon her, why put *any* person on board? The very circumstance of putting a prize master on board, clearly evidences an intention *not* to abandon.

It is perfectly immaterial whether the capture was absolute or conditional only, to secure the British property found on board: To secure *that*, it was necessary to capture the whole: The capture cannot be considered as partial.

It is said, on the part of the Claimants, that there is no general rule of the law of nations that every trading with the enemy is unlawful. We are of a different opinion. *Bynkershoek* lays down the rule. *Bynk. Q. J. P. book* 1, *c.* 3. *Vattel* gives it by implication. He says that, in time of war, not only the two belligerent nations, in their politic capacity, are enemies, but that all the subjects of the one are enemies to all the subjects of the other inclusively. *Vattel, lib.* 3, *c.* 5, § 70. Sir William Scott, in the case of *the Hoop*, 1 *Rob.* 167, has laid down the rule—the *universal rule*. The exception which he allows to this general principle is, that, under certain circumstances, funds may be withdrawn with license from the war-making power. So in the United States licenses for the same purpose may be granted by the same power. But this, as has been already observed, is not a case of withdrawing funds; the funds entitled to the benefit of the exception are such only as were in the country before the war.

It is said by the counsel for the Claimants, that the intention to sail to England was not carried into effect, and therefore no illegal act was committed, even supposing that the act, if committed, would have been illegal. But we contend that the offence was consummated by the overt-act of sailing *for* the enemy's country several days. Such is the law in the case of blockade. Such, also, it is stated to be by sir William Scott, in the case of a vessel sailing to a port which was captured, during the voyage, by the nation to which the vessel belonged. By all the analogies of law an intention *in part executed* completes the offence. 1 *Rob.* 132, 156. *The Columbia.*

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But it has been denied that the act, if carried into execution, would have been illegal, in the present case; it has been urged that the safety of the property required it. But the law of nations does not permit a man to secure his property by taking it to the enemy's country.

The case of *Hallet v. Jenks*, was cited as supporting the claim of the Appellants. But there, *compulsion* to sell and to take the produce of the enemy's country in payment, was part of the case stated. Here, the purchase of a return cargo, was *voluntary*; which materially alters the case. Welles ought to have left his funds in the enemy's country.

As to the additional instructions of the president, they clearly do not embrace this case, either by their letter or spirit. An expectation had been raised that, upon the repeal of the orders in council, our non-intercourse would cease. The instructions were intended to meet this case—to redeem the pledge, and save the national faith. These instructions are explained by the act of congress of January 2, 1813, authorizing the remission of the forfeitures incurred under the non-intercourse. That act directs the secretary of the treasury to remit the forfeitures in the case of such American property only, as sailed before the 15th September, 1812; a time by which the merchants in England were presumed to have been undeceived.

The proviso to the act of 13th July, 1813, does not alter the nature of the instructions; it leaves them to be expounded by the Courts.

DEXTER, *in reply*.

This is a more favorable case than if the property had been in the enemy's country before the war. The object in going to England, was merely to save the property from British capture, to which it was exposed, and for this purpose to pass through the enemy's country in disguise—conduct perfectly justifiable in a case like this.

As to the capture, no evidence has been produced to prove the fact. If there had been any agreement that this should be considered as a capture, we will admit

that it would have been one. But no such agreement is shown—it does not appear that any thing of the kind was intended.

But supposing it to have been a captur by agreement—even then the extent of the capture must be limited by the terms of that agreement. 1 *Rob.* 204, 213. *The Jonge Jacobus Baumann.*

There is no evidence of Welles being in England *animo manendi.*

Monday, March 7th. *Absent*....TODD, *J.*

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

The principles settled in the case of the Rapid decides this cause so far as respects the character of the Alexander and her cargo. In open sea, unpressed by any peculiar danger, with a full knowledge of the war, she changes her course and seeks an enemy's port. If such an act could be justified, it were vain to prohibit trade with the enemy. The subsequent traffic in the enemy country, by which her return cargo was obtained, connects itself with this voluntary sailing for an enemy port; nor does the circumstance that she was carried by force into Ireland, when her actual destination was England, break the chain. The conduct of the Alexander is much less to be defended than that of the Rapid.

But it is alleged by the Claimants, that in this case there was no actual capture. This allegation cannot, in the opinion of the Court, be sustained. That the America took possession of the Alexander with the intention of making prize of that part of her cargo which might be deemed British, is not controverted. How was this intention to be executed, how was this part of the cargo to be libelled, if it was not captured? And if such part of the cargo as might eventually be British, was captured, and the whole remained together in the vessel, how can the capture be considered as partial?

But it has been truly observed, that it is not non-capture, but abandonment, for which the Complainants in fact contend.

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But while the whole cargo remains together, claimed by the captor, if it be enemy property, how can any part of it be said to be abandoned? If it was entirely abandoned, for what purpose was one of the crew of the America put on board the Alexander?

The inability of the prize master to secure the captured vessel against a rescue, should one be attempted, his inability to bring in the vessel without the aid of the hands belonging to her, is, in reason, no proof of abandonment. If the circumstances of the captured vessel be such as to do away all apprehension of rescue, and inspire confidence that the crew will bring her into port, no reason is perceived why the property of the captor, may not be retained as well by a prize master alone, as by a considerable detachment from his crew. The cases cited to this point by the counsel for the captors are entirely satisfactory.

With as little reason do the Claimants seek to shelter themselves under the instructions of the 28th of August, 1812. Those instructions apply, in express terms, to such American vessels as have sailed from Great Britain for the United States, "in consequence of the alleged repeal of the British orders in council." A vessel which sailed while those orders were not alleged to be repealed, cannot bring herself within these instructions.

But it is alleged that these instructions are still issued, and must mean something. Rather than ascribe their continuance to inattention, the counsel for the Claimants would give them a construction in direct hostility with their letter and spirit. Were this reasoning even admitted to be correct, which it is not, it would become the duty of the Court to be astute in finding some object to which they might possibly apply. It is possible though certainly it is barely possible, that some vessels which sailed from England while the orders of council were supposed to be repealed, may not yet have reached the United States. It would be more reasonable to reserve these instructions for such possible case, than to apply them to cases which can neither be brought within their words nor their meaning.

The sentence is affirmed with costs

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THIS was an appeal from the Circuit Court for the district of Massachusetts.

The sailing on a voyage under the license and passport of protection of the enemy, in futherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war.

D. DAVIS, *for the Claimants.*

The brig *Julia* and cargo, consisting of about three hundred hogsheads of salt, were captured by the United States' frigate Chesapeake, Samuel Evans, commander, about the last of December, 1812, and libelled and condemned in the district Court of Massachusetts. Upon appeal to the Circuit Court, the sentence of condemnation was affirmed, and the Claimants now appeal to this Court.

The allegation, in the libel, is, that the property belongs to British subjects.

The facts proved and relied upon by the Claimants, and which are fully substantiated by the documents contained in the record, are as follows: That the Julia and cargo were owned wholly by the Claimants, who are native American citizens; that she was documented as an American ship, for a voyage from Baltimore to Lisbon, with a cargo of corn, flour, and bread; that she sailed with this cargo from Baltimore to Lisbon, where she arrived in safety; that the outward cargo was there sold to Portuguese merchants, in that port, and a return cargo of salt purchased with a part of the proceeds of the outward cargo; and that, as the Julia was returning to Boston, her port of discharge, with her homeward cargo, she was captured by the Chesapeake; that all the transactions of the voyage were really and truly for account of the Claimants, and that, *in point of fact,* no connexion, intercourse, trade, supply, or other matter or thing relative thereto, was ever had, made, intended, or contemplated with the enemy, in the whole course of this voyage.

It is admitted by the Claimants, that copies of the following documents signed and granted by admiral Sawyer and Andrew Allen, late the British consul at Boston, were filed in the Courts below, and, for the

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reasons stated by the learned judges, admitted in evidence, viz:

1st. A license from admiral Sawyer, in the words following:

"By Herbert Sawyer, esq. vice admiral of the blue, and commander in chief of his majesty's ships and vessels employed and to be employed in the river Saint Lawrence, along the coast of Nova Scotia, the islands of Anticosti, Madelaine and Saint John, and Cape Breton and the bay of Fundy, and at and about the island of Bermuda, or Somers' Islands, &c. &c. &c. [SEAL.]

"Whereas Mr. Andrew Allen, his majesty's consul at Boston, has recommended to me Mr. Robert Ewell, a merchant of that place, and well inclined towards the British interest, who is desirous of sending provisions to Spain and Portugal, for the use of the allied armies in the Peninsula, and whereas I think it fit and necessary that encouragement and protection should be afforded him in so doing.

"These are therefore to require and direct all captains and commanders of his majesty's ships and vessels of war which may fall in with any American, or other vessel bearing a neutral flag, laden with flour, bread, corn or peas, or any other species of dry provisions, bound from America to Spain or Portugal, and *having this protection on board*, to suffer her to proceed without unnecessary obstruction or detention in her voyage; provided she shall apppear to be steering a due course for those countries, and it being understood this is only to be in force for one voyage and within six months from the date hereof.

"Given under my hand and seal, on board his majesty's ship Centurion, at Halifax, this fourth day of August, one thousand eight hundred and twelve.

"H. SAWYER, *Vice Admiral.*"

By command of the vice admiral.
WILLIAM AYRE.

2d. *The following document signed by Andrew Allen.* THE JULIA, LUCE, MASTER.

"To the commanders of his majesty's ships of war or of private armed ships belonging to subjects of his majesty.

"Whereas from the consideration of the great importance of continuing a regular supply of flour and other dried provisions to the allied armies in Spain and Portugal, it has been deemed expedient by his majesty's government that, notwithstanding the hostilities now existing between Great Britian and the United States, every degree of encouragement and protection should be given to American vessels laden with flour and other dry provisions, and *bona fide* bound to Spain or Portugal. And whereas, in futherance of these views of his majesty's government, Herbert Sawyer, esq. vice admiral and commander in chief on the Halifax station, has addressed to me a letter under the date of the 5th of Aug. 1812, (a copy whereof is hereunto annexed) wherein I am instructed to furnish a copy of his letter, certified under my consular seal, to every American vessel so laden and bound, destined to serve as a perfect safeguard and protection of such vessel in the prosecution of her voyage. Now, therefore, in obedience to these instructions, I have granted to the American brig Julia, Tristram Luce, master, of 159 tons burthen, now lying in the harbor of Boston, and bound to Baltimore for the purpose of taking in a cargo of flour and corn, and proceeding thence to a port in Spain or Portugal, not under French domination, the annexed documents, requesting all officers commanding his majesty's ships of war, or private armed ships belonging to subjects of his majesty, to give to the said vessel all due assistance and protection in the prosecution of her voyage to Spain or Portugal, and on her return thence to her port of original departure, laden with salt or with specie to the nett amount of her outward cargo, or in ballast only.

"Given under my hand and seal of
[CONSULAR SEAL.] office at Boston, this eighteenth day of September, 1812.

"ANDREW ALLEN, jun.
His majesty's consul."

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3d. "A copy of admiral Sawyer's letters to A. Allen, referred to in the preceeding document, and certified under the consular seal; as follows:

(COPY

"*His Majesty's ship Centurion,*
At Halifax, the 5th of August, 1812.

"SIR,

"I have fully considered that part of your letter of the eighteenth ultimo, which relates to the means of insuring a constant supply of flour and other dried provisions, to the allied armies in Spain and Portugal, and to the West India islands; and, being aware of the importance of the subject, concur in the proposition you have made. I shall therefore give directions to the commanders of his majesty's squadron under my command, not to molest American vessels unarmed and so laden, "*bona fide*" bound to British, Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under the consular seal.

"I have the honor to be, sir,
"Your most obedient humble servant,
"H. SAWYER, *Vice Admiral.*

To Andrew Allen, esq.
his majesty's consul, Boston.

"*Office of his Britannic Majesty's Consul.*

"I, Andrew Allen, jun. his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, hereby certify that the annexed paper is a true copy of a letter addressed to me by Herbert Sawyer, esq. vice admiral and commander on the Halifax station.

[CONSULAR SEAL.]

"Given under my hand and seal of office, at Boston, in the state of Massachusetts, this eighteenth day of September, in the year of our Lord, one thousand eight hundred and twelve.

"ANDREW ALLEN, jun."

If the opinions of the Courts below, in admitting copies of these documents to be received as evidence, were correct, then it is also admitted that these licenses and letters had been obtained for, and were found on board the Julia, at the time of her capture.

Upon this statement, and upon the evidence contained in the record, the Claimants submit two points to the decision of the Court.

1. That the mere acceptance or possession of the British license and documents, do not subject the property to condemnation.

2. That if the peculiar terms of the license in this case create a presumption unfavorable to the Claimants, either of an intention to supply the enemy, or of any other unlawful intercourse with the enemy, such presumption is intirely destroyed by the evidence in the case, which shews that no such supply or intercourse did ever, *in fact*, take place.

As to the first point. The nature and effect of an enemy's license, so far as respected the acceptance, possession or use of such a document by an American citizen, were so fully and ably pointed out in the case of the *Aurora*, that the counsel for the Claimants, is content to rely upon, and to refer the Court to the arguments and authorities which were submitted and quoted in that case, upon this point.

But *as to the second point*. If the Julia had been captured on her passage to Lisbon, with these British documents on board, there might have been some ground for a condemnation :—The suspicious or obnoxious parts of them, such as those which state that "Elwell is well inclined towards the British interest," and that he contemplates furnishing supplies to the allied armies in the Peninsula, might have raised a presumption that such was his intention, and would have cast the *onus probandi* upon him, or upon those in whose hands the license might be found. But it is contended, that if, upon furnishing the proof, it shall appear that no unlawful intercourse with the enemy ever did, *in fact, take place*, and, moreover, that no such intercourse was ever even *intend-*

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ed to be held with the enemy, the presumption against the Claimants, arising from the terms of the British documents, will be entirely destroyed, and the Complainants left in a state wholly free from guilt, both legal and moral.

That this is a correct position, the Court is referred to the case of the *Matilda*, decided in the North Carolina Circuit, by the chief justice of the United States, and reported in the *American law journal*, *p.* 478. In that case, the license was granted after the war, and for the express purpose of a trade and supply to the *British W. I. islands*: But there was no evidence that any *act* of trading had been *committed*. In that case the *chief justice* is said to have declared, "that there was no evi-"dence of a criminal intent, except that of the license; "that the obtaining the license was to deceive the ene-"my, which the Claimants lawfully might do; and that "the case was cleared of all doubts by the evidence, "which stated the *real object of the voyage*."

In the case of the *Abby*, 5 *Rob. p.* 254, it is expressly stated to be law "that there must be an *act of trading* to "the enemy country, as well as the *intention*; that there "must be a *legal* as well as *moral* illegality." It is in the same case stated, that "no case has been produced, "in which a *mere intention* to trade with the enemy, "*contradicted by the fact*, enures to condemnation." Upon both points (said sir William Scott,) "I am of "opinion, that the Claimant is entitled to restitution. On "the 1st, there was no *illegal act*; on the 2d, there was "neither *intention* nor *act*."

There is no principle better known or established by the writers both upon law and ethics, than that there must be both a *will* and an *act* to constitute an offence. The *act* is necessary to demonstrate the depravity of the *will*: a vicious *will*, without a vicious *act* is no offence.

It is not denied, that the Julia and her outward cargo were the property of the Claimants; it is not denied, that the Julia, on her departure from Baltimore, was documented, in every respect, as required by law, as an American ship bound from Baltimore to Lisbon, with a cargo of flour, corn and bread.

It is not denied, that the Julia, with this cargo on board, was ordered to proceed, and that she did in fact proceed, to Lisbon; and that it was the *intention* of the owners that the cargo should be there sold, to the best advantage, to merchants or other subjects of that government; nor is it denied, that the Julia and cargo did, *in fact*, proceed to Lisbon for these purposes.

It is not denied, that this cargo of corn, flour and bread, was in fact carried to Lisbon, there landed, and *sold to a house of merchants of that city.* It is also a fact, probably not disputed, that the cargo of salt, with which the Julia was laden, and with which she was captured on her homeward voyage, was purchased with the proceeds of the cargo sold at Lisbon. And it is not *pretended* that there was *any intercourse* with the enemy at Lisbon, or with any of his agents; or that there was in reality, any *sale, contract or other transaction by the Claimants, or their agents, that any part of the cargo, or of the proceeds of it, should, in any manner, serve as a supply or come to the hands and possession of the enemy.* On the other hand, it does not appear from all the evidence in the case, that the whole object of the voyage was to export the cargo of the Julia to Lisbon, there to be sold, and the proceeds to be invested in such funds as are pointed out in the owners' letter of instructions to the captain. The intention to trade with, or supply, the enemy, is proved only from the *prima facie* evidence of the license and other British documents; and this evidence is fully explained and counteracted by the whole mass of evidence in the case, shewing the *real object* of the voyage, and that no supply, trading or intercourse were in fact had with the enemy.

If the bare possession or acceptance of a license condemns the property which it purports to protect, the Julia must be condemned; but if the *presumptive* or *prima facie* evidence resulting from the possession of the license, *however obnoxious may be the terms of it*, can be explained and counteracted by evidence of the facts, the Julia and cargo must be restored. The former position, it is conceived, will never be sanctioned by this Court; and if the latter be not established, the Claimants will be severely punished for an act which they *never committed*, and which they *never intended* to commit, viz. that of trading with, and supplying the enemies of their coun-

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try. The case of the Julia, therefore, turns *upon a question of fact.* Did the Julia pursue a voyage to a neutral port, and was her cargo disposed of to the subjects of a neutral country, or did she pursue the voyage and furnish the supplies *to the enemy,* which appear to have been the objects of the British admiral? It is repugnant to law and reason, that a man shall not be permitted to prove his innocence; and, when he has proved it, that he should be held guilty, and punished. If taken with the mainour, may he not prove that he came honestly by the goods?

If a contrary doctrine be established, it will lead to one inevitable result; viz. *a prohibition of all trade from this to a neutral country which happens to be in alliance with Great Britain:* it will be, in fact, declaring that a cargo of flour shall not be exported to Spain or Portugal, because the neutral subjects, to whom it may be there sold, may sell it again to their British allies.

This case is distinguishable from, and stands upon much firmer ground than that of the *Aurora.* In that case, the ship was taken on her outward passage, and (as it was alleged) out of her course to her ostensible port. It was therefore impossible for the Claimants to remove the presumption against them, arising from the possession of the license, by the *subsequent events of the voyage.* But in this case, every thing is explained, and every doubt or suspicion removed by the evidence shewing the *bona fide* objects and ultimate termination of the voyage. The case is thus cleansed of *every thing* that might be presumed to be foul by the *unhappy* terms of the license, or the *officious* and unofficial interpositions of Mr. Allen. The case must turn upon the *bona fide* views, and intention of the Claimants, and upon the evidence that, *in point of fact,* no unlawful intercourse between them and the enemy *ever existed,* or was ever *contemplated.* If they have merely accepted a license, but have made no *unlawful use* of it, *they cannot be injured by it.*

RUSH, *Attorney General, in behalf of the United States.*

It is utterly impossible that, if any American property, embarked in a trade under an enemy license, can be the subject of prize, this should escape. The transaction is the most obnoxious of its class; and presents the

leading question in its most advantageous forms for the captors.

The object of the enemy was supply to the allied armies in Portugal and Spain. The engagement to execute that purpose was the consideration of the protection granted by the license. The purpose was executed in fact, and in strict conformity with the engagement. The homeward cargo was purchased with the proceeds of the outward; and, when captured, was still under the protection of the license. If the circumstances in this case do not amount to a trading with the enemy, there is no such thing. If this license, (or rather these licenses,) should not be held to give to the property a hostile character, no license, whatever may be the facts with which it is combined, can produce that effect.

There can be no foundation for restitution in this case but one. It has been doubted whether *American* property can, for any cause, become subject to confiscation as prize, when captured by a privateer; and it will be contended (as it is understood) in the case of the Frances, that it cannot.

The capture on this occasion, however, was made by a *national vessel*, in virtue of the *declaration of war*, and the public law of the world operating upon it. The attorney general does not believe that this difference in fact creates any difference in the legal conclusion; because he supposes that privateers have, upon the sound construction of the act of congress, the same rights of capture with national vessels; but he contends that, even if it should be held that the rights of capture, vested by their commissions in *private armed* vessels, are confined to property strictly (not *constructively*) British, the rights of *national* vessels are not so restricted.

The Court is referred to the opinion at large (in the transcript,) of the learned judge by whom this cause was decided in the Circuit Court, for a very able discussion of the doctrine which it involves.

Monday, March 7th, 1814. *Absent*...TODD, *J.*

STORY, *J.* delivered the opinion of the Court as follows:

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The facts of this case, and the grounds upon which a decree of condemnation was pronounced in the Circuit Court, fully appear in the opinion of that Court which accompanies this record. That opinion has been submitted to my brethren, and a majority of them concur in the decree of condemnation, upon the reasons and principles therein stated. It is not thought necessary to repeat those reasons and principles in a more formal manner; it is sufficient to declare as the result of them, that we hold, that the sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality, as subjects the ship and cargo to confiscation as prize of war; and that the facts of the present case afford irrefragable evidence of such act of illegality.

The judgment of the Circuit Court is therefore affirmed with costs.

The following is the opinion of the Circuit Court of Massachusetts referred to, in the foregoing opinion.

"The *Julia* and cargo were captured, as prize, by the United States' frigate Chesapeake, commanded by captain Evans, on the 31st December, 1812. From the preparatory evidence and documents it appears that she sailed from Baltimore, on or about the 31st October, 1812, bound on a voyage to Lisbon, with a cargo of corn, bread and flour; and the capture took place on the return voyage to the United States. The vessel and cargo were documented as American, and as owned by the Claimants, who are American citizens. The vessel had on board sundry documents of protection from British agents, which were delivered up to the captors, and, together with the other ship's papers, were put on board of the prize, in the custody of the prize master; and these documents were the unquestionable cause of the capture. It appears that the American master and crew were left on board the prize, and, during the subsequent voyage to the United States, these British documents were taken from the custody of the prize master surreptitiously and without his knowledge as to the time or manner: he alleged expressly that they were stolen, and this allegation seems

admitted by the master, in a supplementary affidavit, who, however, denies any knowledge or connexion in the transaction. The prize master took exact copies of these documents, for the purpose of sending them to the secretary of the navy; which copies have been produced in Court, and verified by his affidavit. All the other original documents have been faithfully produced. Upon the examination of the master upon the standing interrogatories, on the 18th February, 1812, although there are several interrogatories, and particularly the 16th and 27th, which point directly to the subject matter, he did not state the existence of any British document, passport, safeguard or protection; and, what is quite as remarkable, he expressly declared that he knew not upon what pretence nor for what reason the vessel and cargo were captured. It was not until after the time assigned for the trial, and on the 8th of March, 1813, that the master, by a supplementary affidavit, (which was admitted through great indulgence, and contrary to the general practice of prize Courts,) attempted to explain his omission, and to vindicate his misconduct. The apology is equally weak and futile. At the time when these examinations were taken, the interrogatories had been drawn up with care and deliberation. The commissioners were present to explain to the understanding of every man intent on truth, the meaning of any question which might appear obscure. The master was a part owner of the vessel and cargo, and the regular depository of all the papers connected with the voyage. It is utterly incredible that he should not recollect, on his examination, the existence of these British documents. They were put on board for the special safeguard and security of the vessel and cargo. Indeed, independent of them, the risque of the capture would have been imminent. A master can never be admitted to be heard, in a prize Court, to aver his ignorance or forgetfulness of the documents of his ship. It is his duty to know what they are; and he cannot be believed ignorant of their contents, without overthrowing all the presumptions which govern in prize proceedings. Looking to the whole conduct of the master, it seems to be irreconcilable with the rules of morality and fair dealing; and I have great difficulty in exempting him from the imputation of being guilty of a wilful suppression of the truth.

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At the hearing, a preliminary objection was taken to the introduction of the copies of the British documents, upon the ground that the originals, as the best evidence, ought to be produced. The rule undoubtedly applies when the originals are in existence, and in the possession or control of the party. The extraordinary disappearance of these important papers, under the circumstances of this case, I can have little doubt was occasioned by a fraudulent substraction. There is no reason to impute this substraction to the prize master. The documents were to him a very important protection; they constituted the avowed reason of the capture, as the mate and some of the seamen testify. It is true that the master has declared that he knew not the pretence of capture; but it can hardly be believed that he could be ignorant of a fact which so materially affected his interest. I feel myself bound to make very unfavorable inferences against him; and if, *in odium spoliatoris*, I impute the substraction to some person on board connected with the voyage, and in the confidence of the master, it is measuring out no injustice to one who appears to deem mis-statements and concealments no violent breach of good faith. I shall, therefore, admit the copies, verified as they are, as good evidence in these proceedings; and I will add, that if a single material fact in favor of the Claimants had depended upon the supplementary affidavit of the master, I should have felt myself compelled to repudiate it in order to vindicate the regularity of prize proceedings, and suppress the efforts of fraud to derive benefit from after thoughts and contrivances. These remarks are not made without regret; but public duty requires that manifest aberrations from moral propriety should not receive shelter in this Court.

Having disposed of this preliminary objection, I now proceed to consider the two questions which have been so ably discussed in this case.

1st, Whether the use of an enemy's license or protection, on a voyage to a neutral country in alliance with the enemy, be illegal so as to affect the property with confiscation.

2d. If not, whether the terms of the present license distinguish this case unfavorably from the general principle.

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The British documents which were on board, and which, for conciseness, I have termed a license, are as follows:

☞ *It is thought unnecessary to insert these documents here, as they are to be found at length in the argument of the Claimant's counsel in the former part of this report.*]

In approaching the more general question which has been raised in this case, I am free to acknowledge that I fell no inconsiderable diffidence, both from the importance of the question, and the different opinions which eminent jurists have entertained respecting it: Nor am I insensible, also, that it has entered somewhat into political discussions, and awakened the applause and zeal of some, and the denunciations of others, considered merely as a subject of national policy, and not of legal investigation. It has now become my duty to examine it; and, whatever may be my opinion, I feel a consolation that it is in the power of a higher tribunal to revise my errors, and award ample justice to the parties.

At the threshold of this enquiry, I lay it down as a fundamental proposition, that strictly speaking, in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity. I am aware that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse. *Bynkershoek* says, "*Ex natura belli, commercia inter hostes cessare, non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant.*" *Bynk. Q. J. P. book* 1, *c.* 3. And yet it seems not difficult to perceive that his reasoning extends to every species of intercourse. *Valin*, in his commentary on the French ordinance, speaking of the reason of requiring the name and domicil in a policy, says, "*Est encore de connaitre, en temps de guerre, si malgré l'interdiction de commerce, qu' emporte toujours toute declaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l' Etat, ou avec des amis ou alliés, par l'interposition desquels on ferait passer aux en-*

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nems des munitions de guerre et de bouche, ou d' autres effets prohibés; car tout cela, étant defendu comme préjudiciable a l' etat, serait sujet a confiscation, et a être declaré de bonne prise." *Lib.* 1, *tit.* 6, *art.* 3, *p.* 31. In another place, adverting to a case of neutral, allied, and French property on board an enemy ship, &c. he declares it subject to confiscation, because "*C' est favorisér le commerce de l' ennemi et faciliter le transport de ses denrées et marchandises, ce qui ne peut convenir aux traites d' alliance ou de neutralité, encore moins aux sujets du Roi auxquels toute communication avec l' ennemi est etroitement défendu sur peine méme de la vie.*" *Lib.* 3, *tit.* 9, *art.* 7, *p.* 253. And *Valin, Traité des Prises, chap.* 5, *sec.* 5, *p.* 62.

From this last expression it seems clear that *Valin* did not understand the interdiction as limited to mere commercial intercourse. In the elaborate judgment of *sir W. Scott*, in *the Hoop*, 1, *Rob.* 165, 196, the illegality of commercial intercourse is fully established as a doctrine of national law: but it does not appear that the case before him required a more extended examination of the subject. The black book of the admiralty contains an article which deems every intercourse with the public enemy an indictable offence. This article, which is supposed to be as old as the reign of Edw. III, directs the grand inquest "*Soit enquis de tous ceux qui entrecommunent, vendent ou achetent avec aucuns des enemis de notre Seigneur le Roi sans license spécial du Roi ou de son admiral.*" But, independent of all authority, it would seem a necessary result of a state of war to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid, therefore, by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy, is strictly inhibited. No contract is considered as valid between enemies, at least so far as to give them a remedy in the Courts of either government; and they have, in the language of the civil law, no ability to sustain a *persona standi in judicio*. The ground upon which a trading with the ene-

my is prohibited, is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the state. The principle is extracted from a more enlarged policy, which looks to the general interests of the nations, which may be sacrified under the temptation of unlimited intercourse, or sold by the cupidity of corrupted avarice. In the language of *sir William Scott*, I would ask, "Who can be insensible to the consequences that might follow, if every person, in time of war, had a right to carry on a commercial intercourse with the enemy, and, under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?"

Nor is there any difference between a direct intercourse between the enemy countries, and an intercourse through the medium of a neutral port. The latter is as strictly prohibited as the former. 4 *Rob.* 65, 79. *The Jonge Pieter.*

It is argued that the cases of trading with the enemy are not applicable, because there is no evidence of actual commerce; and an irresistible presumption arises from the nature of the voyage to a neutral port, that no such trade is intended. If I am right in the position, that all intercourse, which humanity or necessity does not require, is prohibited, it will not be very material to decide whether there be a technical commerce or not. But is it clear, beyond all doubt, that no inference can arise of an actual commerce? The license is issued by the agents of the British government, and, I must presume, under its authority. It is sold (as it is stated) in the market; and if it be a valuable acquisition, the price must be proportionate. If such licenses be an article of sale, I beg to know in what respect they can be distinguished from the sale of merchandize? If purchased directly of the British government, would it not be a traffic with an enemy? If purchased indirectly, can it change the nature of the transaction? It has been said

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that if purchased of a neutral, the trade in licenses is no more illegal than the purchase of goods of the enemy fabric *bona fide*, conveyed to neutrals. Perhaps this may, under circumstances, be correct: but I do not understand that the purchase of goods of enemy manufacture, and avowedly belonging to an enemy, is legalized by the mere fact of the sale being made in a neutral port. The goods must have become incorporated into the general stock of neutral trade, before a belligerent can lawfully become a purchaser. If such licenses be a legitimate article of sale, will they not enable the British government to raise a revenue from our citizens, and thereby add to their resources of war? Admit, however, that they are not so sold, but are a measure of policy adopted by Great Britain to further her own interests, and ensure a constant supply of the necessaries of life, either in or through neutral countries; can it be asserted that an American citizen is wholly blameless, who enters into stipulations and engagements to effect their purposes? Is not the enemy thereby relieved from the pressure of the war, and enabled to wage it more successfully against the other branches of the same commerce not protected by this indulgence?

It is said that the case of a personal license is not distinguishable from a general order of council authorizing and protecting all trade to a neutral country. In my judgment they are very distinguishable. The first pre-supposes a personal communication with the enemy, and an avowed intention of furthering his objects, to the exclusion of the general trade by other merchants to the same country; it has a direct tendency to prevent such general trade; and relieves the enemy from the necessity of resorting to a general order of protection; it contaminates the commercial enterprizes of the favored individual with purposes not reconcilable with the general policy of his country; exposes him to extraordinary temptations to succour the enemy by intelligence; and separates him from the general character of his country, by clothing him with all the effective interests of a neutral. Now these are some of the leading principles upon which a trade with the enemy has been adjudged illegal by the law of nations. On the other hand, a general order opens the whole trade of the neutral country to every merchant. It pre-supposes no incorporation in enemy

interests: It enables the whole mercantile enterprize of the country to engage upon equal terms with the traffic; and it separates no individual from the general national character. It relaxes the vigor of war, not only in that particular trade, but collaterally opens a path to other commerce. There is all the difference between the cases that there is between an active personal co-operation in the measures of the enemy, and the merely accidental aid afforded by the pursuit of a fair and legitimate commerce.

In the purchase or gratuity of a license for trade, there is an implied agreement that the party shall not employ it to the injury of the grantor; that he shall conduct himself in a perfectly neutral manner, and avoid every hostile conduct. I say there is an implied agreement to this effect, in the very terms and nature of the engagement. I am warranted in declaring this, from the uniform construction put by Great Britain on the conduct of her own subjects acting under licenses. Can an American citizen be permitted in this manner to carve out for himself a neutrality on the ocean, when his country is at war? Can he justify himself in refusing to aid his countrymen who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services, when the necessities of the nation require them? Can an engagement be legal, which imposes upon him the temptation or necessity of deeming his personal interest at variance with the legitimate objects of his government? I confess that I am slow to believe that the principles of national law, which formerly considered the lives and properties of all enemies as liable to the arbitrary disposal of their adversary, are so far relaxed that a part of the people may claim to be at peace, while the residue are involved in the desolations of war. Before I shall believe the doctrine, it must be taught me by the highest tribunal of the nation; in whose superior wisdom and sagacity I shall most cheerfully repose.

It has been said that no case of condemnation can be found on account of the use of an enemy license. Admitting the fact, I am not disposed to yield to the inference that it is therefore lawful. It is one of the many novel questions which may be presumed to arise out of

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the extraordinary state of the world. The silence of adjudged cases proves nothing either way: It may well admit of opposite interpretations. The case of the *Vrow Elizabeth*, 5 *Rob.* 2, has been cited by the captors in support of the more general doctrine. It was a case where the ship had the flag and pass and documents of an enemy's ship; and the Court held that the owner was bound by the assumed character. There is no similiarity in the case before the Court. The ship and cargo were documented as American and not as British property. As little will the *Clarissa*, (5 *Rob.* 4,) cited on the other side, apply. It was, at most, but a license given by the *Dutch* government, allowing a neutral to trade within its own colony: in all other respects the ship and property were avowedly neutral; and, unless so far as the English doctrines, as to the colonial trade could apply, there was nothing illegal or improper in waving any municipal regulations of colonial monopoly in favor of a neutral. There was nothing which compromitted the allegiance or touched the interest of the neutral country. If, however, this license had conferred on the neutral the special privileges of a Dutch merchant, or had facilitated the Dutch policy in warding off the pressure of the war, it would probably have received a very different determination. See the *Vreede Scholtys*, 5 *Rob.* 5, *note (a.)* The *Rendsborg*, 4 *Rob.* 98, 121. We all know that there are many acts which inflict upon neutrals the penalty of confiscation, from the subserviency which they are supposed to indicate to enemy interests; the carrying of enemy dispatches; the transportation of military persons; and the adapting of the coasting trade of the enemy. The ground of these decisions is the voluntary interposition of the party to further the views and interests of one belligerent at the expense of the other: and I cannot doubt that the *Clarissa* would have shared the general fate, but from some circumstance of peculiar exemption.

By the prize code of Lewis XIV. (which I quote the more readily because it is, in general, a compilation of prize law as recognized among civilized nations,) it is a sufficient ground of condemnation that a vessel bears commissions from two different states. *Valin (Traite des prises, p.* 53,) says, "*A l'égard du vaisseau où se trouveront des commissions de deux différens princes ou*

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dats, il est également juste qu' il soit declaré de bonne prise, soit parce qu' il se peut arborer le pavillon de l'un, en consequence de sa commission, sans faire injure à l'autre, ceci. au reste, regarde les Français comme les étrangers." In what consists the substantive difference between navigating under the commissions of our own and also of another sovereign, and navigating under the protection of the passport of such sovereign which confers or compels a neutral character? *Valin*, in another place (*sur l'ordinance, lib. 3, tit. 9, art. 4, p. 241,*) declares, "*si sur un navire Français il y a une commission d'un prince étranger avec cette de France, il sera de bonne prise, quoiqu'il n'ait arboré que le pavillon Français.*" It is true that he just before observes, "*que ce circonstance de deux congés ou passe-ports, ou de deux connaissements, dont l'un est de France, et l'autre d'un pays ennemi, ne suffit pas seule faire declarer le navire ennemi de bonne prise, et que cela doit dependre des circonstances capables de faire découvrir sa veritable destination.*" But *Valin* is referring to the case of an enemy ship having a passsort of trade from the sovereign of France. I infer from the language of *Valin*, that a French ship sailing under the passport, *conge*, or license of its enemy, without the authority of its own sovereign, would have been lawful prize.

This leads me to another consideration; and that is, that the existence and employment of such a license affords a strong presumption of concealed enemy interest, or, at least, of ultimate destination for enemy use. It is inconceivable that any government should allow its protection to an enemy trade, merely out of favor to a neutral nation, or to an ally, or to its enemy. Its own particular and special interests will govern its policy; and the *quid pro quo* must materially enter into every such relaxation of belligerent rights. It is, therefore, a fair inference, either that its subjects partake of the trade under cover, or that the property, or some portion of the profits, finds its way into the channel of the public interests.

It has been argued that the use of false or simulated papers is allowable in war as a stratagem to deceive the enemy and elude his vigilance. However this may be, it certainly cannot authorize the use of real papers of a hostile character, to carry into effect the avowed pur-

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pose of the enemy. We may be allowed to deceive our enemy; but we can never be allowed to set up, as such a deception, a concert in his own measures for the very purposes he has prescribed.

An allusion has been made to the passports or safe-conducts granted, in former times, to the fishing vessels of enemies; and it has been argued that such passports or safe-conducts have never been supposed to induce the penalty of confiscation. This will at once be conceded, as to the belligerent nation who granted these indulgences; but as to the other nation, where such passports were not guaranteed by treaty or mutual pacts, I have no authority to lead me to an accurate decision. The French ordinance of 1543 authorized the admiral to make fishing truces with the enemy; and, where no such truces were made, to deliver to the subjects of the enemy, safe-conducts for fishing upon the same stipulations as they should be delivered to French subjects by the enemy. This, therefore, was an authority to be exercised only in cases of reciprocity; and it seems to have been abolished from the manifest inconveniences which attended the practice. *Valin, sur ord. lib.* 1, *p.* 689, 690. I do not think that any argument in favor of the validity of the present license, (unrecognized as it is by our government,) can be drawn from these ancient examples as to fisheries.

It has been argued that the voyage was lawful to a neutral port, and the mere use of a license cannot cover a lawful voyage with the taint of illegality. This, however, is assuming the very point in controversy. It is not universally true that a destination to a neutral port gives a *bona fide* character to the voyage. If the property be ultimately destined for an enemy port or an enemy use, it is clear that the interposition of a neutral port will not save it from condemnation. 4 *Rob.* 65, 79. *The Jonge Pieter.* Suppose, in the present case, the vessel and cargo had been destined to Lisbon for the express use of the British fleet there, could there be a doubt that it would have been a direct trade with an enemy? Whether the voyage, therefore, be legal or not, depends not merely upon the destination, but the ultimate application of the property, or the ascertained intentions of the party. A contract to carry provisions to St. Bar-

tholomews for the ultimate supply of the British West India islands, would be just as much an infringement of the law of war, as a contract for a direct transportation. On the whole, I adopt, as a salutary maxim of war, the doctrine of Bynkershoek. "*Vetatur quoquo modo hostium utilitati consulere.*" It is unlawful in any manner to lend assistance to the enemy, by attaching ourselves to his policy, sailing under his protection, facilitating his supplies, and separating ourselves from the common character of our country.

I am aware that the opinion which I have formed as to the general nature of licenses, is encountered by the decisions of learned judges for whom I entertain every possible respect. This circumstance alone, independent of the novelty and importance of the question, would awaken in my own mind an unusual hesitation as to the correctness of my own opinion: but, after much reflection upon the subject, I have not been able to find sufficient grounds to yield it; and my duty requires that, whatsoever may be its imperfections, my own judgment should be pronounced to the parties.

I am glad, however, to be relieved from the painful necessity of deciding the more general question, by the peculiar terms of the present license, which I consider as affording irrefragable proof of an illicit intercourse with the enemy, and a direct contract to transport the cargo for the use of the British armies in Spain and Portugal. The very preamble to the license of admiral Sawyer shows this in a most explicit manner, and discloses facts which it is no harshness to declare, are not very honorable to the principles or the character of the parties.

It has been attempted to distinguish the present Claimants from Mr. Elwell, to whom the original license was granted. It could hardly have been expected that such an attempt would be successful. The assignees cannot place their derivative title on a better footing than the original party. They must be considered as entering into the views and contracting to effectuate the intentions of the latter; and, at all events, the illegality of the employment of the license attaches indissolubly to their conduct. If it were material, however, it might deserve consideration how far an actual assignment is

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shown in the case. It rests on the affidavit of one of the Claimants, and on the mere face of papers which carry no very decisive character, and are quite reconcileable with concealed interests in other persons, as the records of prize Courts abundantly show. However, I only glance at this subject, as it in no degree enters into the ingredients of my judgment.

A very bold proposition was, at one time, advanced in the argument by the Claimants' counsel, that if this cargo had been actually destined to Portugal for the use of the allied armies of Great Britain and Portugal, or even for the use of the British army, it would not be an offence against the laws of war. In the sequel, if I rightly understand, this proposition, in this alarming extent, was not contended for; and certainly it is utterly untenable upon the principles of national law.

But it was insisted on, that the British armies in Portugal and Spain were to be considered as incorporated into the armies of those kingdoms, and as not holding the British character.

If I could so far forget the public facts of which, sitting in a prize Court, I am bound to take notice, there is sufficient in the papers before me to prove the contrary of this suggestion. In admiral Sawyer's license and Mr. Allen's certificate they are expressly called the allied armies; thereby plainly admitting a separate character and organization: and so, in point of fact, we all know it to be; if, indeed, the British character be not predominant throughout these countries. I reject the distinction, therefore, as utterly insupportable in point of fact.

It has been further argued that, if the conduct be illegal, it is but a personal misdemeanor in no degree affecting the vessel and cargo; and at all events, that the illegality was extinguished by the termination of the outward voyage. The principles of law afford no countenance to either part of the proposition. If the property be engaged in an illegal traffic with the enemy, or even in an attempt to trade, it is liable to confiscation as well on the return as on the outward voyage: and it may be assumed as a proposition, liable to few, if any, excep-

tions, that the property which is rendered auxiliary or subservient to enemy interests, becomes tainted with forfeiture.

I cannot but remark that the license in this case, issued within our own territory by an agent of the British government, carries with it a peculiarly obnoxious character. This circumstance, which is founded on an assumption of consular authority that ought to have ceased with the war, affords the strongest evidence of improper intercourse. The public dangers to which it must unavoidably lead, by fostering interests, within the bosom of the country, against the measures of the government, and the breach of faith which it imports in a public functionary receiving the protection of the government, can never be lost sight of in a tribunal of justice. I forbear to dwell further on this delicate subject.

Upon the whole, I consider the property engaged in this transaction as stamped with the hostile character; and I entirely concur in the decision of the district judge, which pronounced it subject to condemnation."

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THIS was an appeal from the Circuit Court for the district of Rhode Island.

The following were the material facts of the case:

Some months after the declaration of war, the ship Aurora, documented as American property, and owned by Thomas M. Clarke and Ebenezer Wheelright, the Claimants, who are American citizens, sailed from Newburyport to Norfolk, in ballast. At the latter place she took in a cargo consisting of bread, flour, corn, &c. and sailed from thence on or about the 12th November, 1812, ostensibly for St. Bartholomews, a neutral island belonging to the Swedes, for which port she had obtain-

The acceptance and use of an enemy's license on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation. It is not necessary, in order to subject the property to

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ed her clearance. The cargo was consigned to the supercargo of the ship. On the 26th November, 1812, she was captured by the American privateer schooner, governor Tompkins, on the high seas. At the time of capture, she was to the leeward of St. Bartholomews, and had on board a British license, which she exhibited to the captors, supposing them to be British. This license consisted of three documents:

condemnation, that the person granting the license should be duly authorized to grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy. Sailing, with an intention to further the views of the enemy, is sufficient to condemn the property, although that intention be frustrated by capture.

1st. A pass for the West Indies, exclusively, from Andrew Allen, his Britannic majesty's consul residing at Boston; to which is annexed a copy of a letter, under the consular seal, from admiral Sawyer to Mr. Allen, as follows:

"To the commanders of any of his majesty's ships of war or of private armed ships belonging to his majesty.

"Whereas from a consideration of the great importance of continuing a regular supply of flour and other dry provisions and lumber to the British islands in the West Indies, it has been deemed expedient by his majesty's government, that, notwithstanding the hostilities now existing between Great Britain and the United States of America, every protection and encouragement should be given to American vessels laden with flour and other dry provisions and lumber, and bound to the British islands in the West Indies. And whereas in futherance of these views of his majesty's government, Herbert Sawyer, esq. vice admiral and commander in chief of his majesty's squadron on the Halifax station, has directed to me a letter under date of the 5th August, 1812, (a copy whereof is hereunto annexed) wherein I am instructed to furnish a copy of his letter, certified under my consular seal, to every American vessel so laden and bound to the West Indies, which is designed as a perfect safeguard and protection to such vessel in the prosecution of such voyage. Now, therefore, in pursuance of these instructions, I have granted to the American ship Aurora, William Augustus Pike, master, burthen 257 47-95ths. tons, now lying in the harbor of Newburyport, and bound to Norfolk for a cargo of flour, corn and other dry provisions for St. Bartholomews, the annexed document, to avail only in a direct

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voyage to the West Indies and back to the United States; requesting all the officers commanding his majesty's ships of war, or of private armed vessels belonging to subjects of his majesty, not only to suffer the said Aurora to pass without molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to the West Indies and in her return to the United States laden with merchandize not exceeding the nett amount of her outward cargo, or in ballast only.

[SEAL.] "Given under my hand and seal of office this first day of October, 1812.

"ANDREW ALLEN, jun.
His majesty's consul."

To the above pass was annexed the following copy of a letter from admiral Sawyer certified under the consular seal, and alluded to in the above document.

"*His majesty's ship Centurion,*
At Halifax, the 5th of August, 1812.

"SIR,

"I have fully considered that part of your letter of the 18th ultimo, which relates to the means of ensuring a constant supply of flour and other dry provisions to Spain and Portugal, and to the West India islands; and, being aware of the importance of the subject, concur in the proposition you have made.

"I shall therefore give directions to the commanders of his majesty's squadron under my command, not to molest American vessels so laden, and unarmed, *bona fide* bound to British, Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter, under the consular seal.

"I have the honor to be, sir,
"Your most obedient humble servant,
"H. SAWYER, *Vice Admiral.*

Andrew Allen, esq.
British Consul Boston.

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"*Office of his Britannic Majesty's Consul.*

I, Andrew Allen, junior, his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, do hereby certify, that the annexed paper is a true copy of a letter addressed to me by H. Sawyer, esq. vice admiral and commander in chief of his majesty's squadron on the Halifax station.

"Given under my hand and seal of office, at Boston, in the state of Massachusetts, this first day of October, in the year of our Lord, one thousand eight hundred and twelve.

[SEAL.]

ANDREW ALLEN, jun."

2d. The following certificate of the Consul:

"*Office of his Britannic majesty's Consul.*

I, Andrew Allen, junior, his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, do hereby certify, that the ship Aurora, Wm. Augustus Pike, being bound to St. Bartholomews (on account of the existing law of the United States, which prevents her return to the United States from a British port) contemplates fulfilling the object comprised in the accompanying license from H. Sawyer, esq. vice admiral and commander in chief on the Halifax station, through a neutral port in alliance with Great Britain.

"Given under my hand and seal of office, at Boston, in the state of Massachusetts, this second day of October, in the year of our Lord, one thousand eight hundred and twelve.

[SEAL.]

ANDREW ALLEN, jun."

3d. The following general pass for the West Indies.

"*Office of his Britannic Majesty's Consul.*

"I, Andrew Allen, jun. his Britannic majesty's consul for the states of Massachusetts, New Hampshire,

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Rhode Island and Connecticut, request all officers commanding his majesty's ships of war, or private armed ships belonging to subjects of his majesty, to permit the American ship Aurora, William Augustus Pike, master, now lying in the harbor of Newburyport, and furnished with a protection from vice admiral Sawyer, for the purpose of carrying flour, corn, lumber and other necessary provisions to the West Indies, and proceeding to Norfolk in ballast for a cargo, to pass without molestation.

"Given under my hand and seal of office, at Boston, in the state of Massachusetts, this first day of October, in the year of our Lord, one thousand eight hundred and twelve.

[SEAL.]

"ANDREW ALLEN, jun."

The Aurora was carried into Newport, Rhode Island, and there libelled. The Circuit Court of that district condemned vessel and cargo as prize to the captors; from which sentence the Claimants appealed to this Court.

HUNTER, *for Appellants.*

The libel, in this case, sets forth that the sailing was for the purpose of supplying the British West India colonies, and that the papers stating the voyage to St. Bartholomews, were fraudulent and collusive; and urges the condemnation of vessel and cargo, on the following grounds:—

1. That the possession of and sailing with a British license is cause of capture and condemnation.

2. That the voyage of the Aurora was intended as an indirect voyage to a British port, through St. Barts.

3. That the real destination of the ship was to a British port.

On the first point, it is contended, on the part of the Claimants, that the having on board a British license or

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pass in a lawful trade to a neutral country, could not, before the act of congress of August 2, 1813, prohibiting the use of British licenses, subject a vessel to capture.

This is clear from the act itself, the operation of which is not to commence from its passage. but, with regard to vessels then in port, was to take effect in five days after the promulgation of the act; with regard to vessels at a distance from the United States, not until the 1st of November; and in some cases not before the 1st of December following. Hence it is evident that the legislature did not consider this act as merely declaratory of the law of nations on the subject, but as then, for the first time, making the use of a British license by an American vessel, illegal. *Laws of U. S. vol. 12, p. 226.*

But we are bound to meet the general proposition, which is that the use of such a license gives a hostile character to the property and the voyage.

The doctrine, that any intercourse with the enemy exposes to condemnation, has been supposed to be very ancient; but we find no case of a decision upon the principle, till the year 1747, when a bill was brought into parliament in consequence of insurance made for enemies. *Parl. debates vol. 26, p. 178. Sir William Murray's speech, on the subject of insuring enemy property, and 1 T. R. 84, Gist v. Mason.*

The rule appears to us to be unreasonable and impolitic. Where is the harm of taking advantage of a relaxation of the rights of war by the enemy? How can that be a crime when granted by the policy of the enemy, which would have been no crime if obtained by force—by conquest? It is not less for our own interest to take advantage of such permission from the enemy, than it is for his interest to grant it. It is a public benefit.

The general rule by which to determine the national character of a vessel, is the domicil of the owner. Here, the owners were American citizens. The case of a vessel sailing under the flag or assumed character of a country to which she does not belong, is admitted to be an exception to the general rule. But here was no sailing under such assumed character. All the papers of

the Aurora were American, except the one in question, which cannot of itself be sufficient to give a hostile character to the holders of it, nor to the vessel and cargo. 1 *N. Y. T. R.* 64, *Jenks v. Hallet and al.*—*Chitty's law of nations* 58.—*Case of the Clarissa cited in* 5 *Rob* 4. *The Vrow Elizabeth.*

The only prohibition, existing at the time of the sailing of the Aurora was to take a license to a British port. That was prohibited by the act of July 6th, 1812, § 7.

By that act, we admit, all commercial intercourse with the *enemy*, was rendered unlawful; but we contend that it was not unlawful to use a British license in a *neutral* voyage. 1 *Rob.* 167, 200. *The Hoop.*

Suppose Great Britain should think proper to permit a particular neutral trade—suppose she were even to protect it by convoy—are we bound to refuse to accept such permission—such protection?

Valin laughs at the English for restoring, in the form of insurance, the captures made by their cruizers; but does not censure the French merchant for taking it.

The voyage in this case was not *made* by the license, but merely made *safer* by it. The voyage was certainly lawful without it: and a license to pursue a voyage which was lawful without it, cannot make that voyage unlawful. *Pamphlet of cases decided in the District Courts of Pennsylvania and Massachusetts, p.* 80, 81. *Judge Davis' opinion on the use of British licenses. Judge Peters' opinion.*—1 *Vez.* 317. *Dunonceau's Bynk.* 166.

On the second point, viz. That the voyage of the Aurora was intended as an indirect voyage to a British port through St. Barts, it is contended by the Claimants, that there is no evidence to justify the fact assumed.

Was this a *bona fide* voyage to St. Barts? On the decision of this point the whole case turns. In discussing this question all the circumstances of the case should be taken into consideration. *Vid. Portalis' opinion in the case of the Pigou, contained in a note to the case of the*

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Charming Betsey, 2 *Cranch*, 98. *Vid. also Ch. J.* MARSHALL's opinion in the case of the *Matilda* decided in North Carolina. *Hall's law journal*, 487.

With respect to those circumstances attending the transaction, which, on first view, are perhaps calculated to excite a suspicion that this was not a *bona fide* voyage to St. Barts, it may be observed, that it was the object of the Aurora to deceive the enemy, and thereby obtain an exemption from capture, during the voyage, by inducing him to suppose that the cargo was ultimately intended for the British. Such an imposition, in a case like the present, we conceive was justifiable.

What motive could the Aurora have had for sailing to a British island rather than to St. Barts? At a British island, she could only take in a cargo of rum; and the importation of such a cargo was prohibited by our own laws. At St. Barts, she could take in a general West India cargo. Motives of interest, therefore, would have induced her to go to the latter place rather than the former.

But suppose the *intention* was to go to a British port; was that intention executed? It was not. But according to the decision in the case of *the Abby*, 5 *Rob.* 254, there must be an *act* of trading as well as an *intention*, in order to subject the vessel to condemnation.

On the third point, which, it is presumed, constitutes the stress of the case, we contend that the real destination of the Aurora was not to a British port, and that the condemnation on the ground of a British supply being intended and proceeded in, is erroneous and against proof.

That the supply of the British West Indies was the object of admiral Sawyer in granting the license, we do not deny: but what *his* intention was, is perfectly immaterial: such was not our intention in accepting it. Our object was to escape capture; and with that view we obtained a license from the enemy, by inducing him to believe that we intended to furnish supplies to his islands.

What is said by Allen, the consul, is mere surplusage: his authority extended no farther than to certify admiral Sawyer's letter: having done this, he was *functus officio*. But suppose the license granted by Allen to have been valid, it was only for a voyage to St. Barts, and would not have protected the Aurora in any other voyage: *That* was the voyage *insured*.

J. WOODWARD, *contra*.

With regard to the act of *August* 2, 1813, which has been said, by the counsel for the Claimants, to prove that the use of British licenses, previous to the passage of that act, was not unlawful, we are still of opinion that the act is merely in affirmation of the law of nations. It is also cumulative—it adds penalties to what was before unlawful; but does not make any thing unlawful which was not so before. The latter clause in the 3d sec. of the act, providing "that nothing contained in the said act shall be so construed as to arrest or stay any prosecutions," &c. was intended to guard against the construction which the Claimants have now attempted to give it. The several periods of time allowed to vessels in different situations, to obtain notice of the act, were allowed them in order that they might be enabled to avoid the *new* penalties.

Trading with the enemy was an indictable offence at common law. 2 *Rolle's Abr.* 173, but it was necessary for congress to fix the penalty for trading on *land*: this they have accordingly done in the act of July 6, 1812. By the course of the admiralty, the thing itself was liable to forfeiture for trading with the enemy.

The British papers on board the Aurora shew a case of *supply*; and therefore the question of pass or license is immaterial. The pass was expressly for the purpose of supplying the enemy.

But suppose the papers do not prove a case of supply, the use of the license on the high seas is, of itself, sufficient to give the property a hostile character. The license in this case is essentially different from a general license by an order in council. *There* no special favor—no particular benefit, is granted.

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The use of a hostile protection in the prosecution of a neutral trade, gives a hostile character to the voyage. Sailing under a hostile convoy is good ground of condemnation; sir William Scott denominates it "*illicit protection.*" Sailing under two commissions is also cause of condemnation. *Valin, p.* 241, *b.* 3, *art.* 9. All these cases are analogous to the present. The Aurora was sailing under the physical force of the enemy. Admiral Sawyer's letter requires the British naval force to assist her in the prosecution of her voyage. She must, therefore be considered as having placed herself under the protection of the enemy, and as having, consequently abandoned her national character.

Trading with an enemy was cause of forfeiture at common law; and whatever was cause of forfeiture at common law, is good cause of condemnation in the admiralty. 2 *Rob.* 82, 69. *The Walsingham Packet.*

The case of *Jenks v. Hallet and al.* cited by the Claimants, is not applicable to the present case: we were not then at war with France.

Sir William Scott, in the case of *the Vigilantia,* 1 *Rob.* 11, 13, has laid it down as a known and established rule, that if a vessel is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails. Now what was the license in question but such a pass?

The license is not a document under the law of nations. The granting of it is the exercise of a municipal right—a prerogative to the crown. The king, however, has no right to grant licenses to any but his own subjects, without a particular act of parliament authorizing him so to do: There is no case in which he has granted a license to strangers without such an act of parliament. If a license be granted without such authority, the person who takes it can take it only as a *subject. Chitty's law of nations,* 256.—*id.* 316.—2 *Roll. Abr.* 173, *tit. Prerogative.*—1 *Rob.* 199, 200. *The Hoop.*—2 *Tucker's Bl. Com.* 258.—*Chitty's law of nations,* 278. —*Reeves,* 358.

Any commercial intercourse, direct or indirect, with

the enemy, is illegal, and cause of condemnation: its illegality does not depend on contract. The intervention of a neutral port makes no diff'rence. 8 *T. R.* 555. *Potts v. Bell and al.*—4 *Rob.* 68, 69, 83, 84. *The Jonge Pieter.*—1 *Rob.* 165, 196. *The Hoop.*—*Chitty's law of nations*, 13, 14, 15.

When the Aurora was taken, she was out of the course to St. Barts, and very far to the leeward of that island. These circumstances afford a strong suspicion that her destination was to some other port.

The return cargo was British produce, and, *prima facie*, British property: if it was not, it is on the Claimants to shew it.

It appears that the captain was kept ignorant of the real destination of the Aurora, and that the supercargo, during his examination *in preparatoria*, was guilty of prevarication. These circumstances alone are good cause of condemnation. *Chitty's law of nations*, 314.

As to what has been said with regard to the intention not being carried into effect, we contend that it was carried into effect to every legal purpose. An overt-act was sufficient to constitute the offence; and sailing with the license was such an overt act.

PINKNEY, *on the same side.*

The rule, that trade with the enemy is illegal, results necessarily from the declaration of war, and is included in it: There was no necessity for any subsequent law to enforce the rule.

It has been said that no judicial decision on this subject is to be found of an earlier date than 1747. It is true sir William Scott, in his enumeration of cases where this question was agitated has gone no farther back than that date: but *sir John Nicholls*, in his argument in the case of *Potts v. Bell*, has cited cases from *sir Edward Simpson's MS. reports in the admiralty*, where this principle was decided to be correct as early as 1704, and 1707: and it is to be presumed that those

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decisions were founded upon former cases. See also 1, *Vez.* 317, *Henkle v. the Royal Ex. In. Co. in* 1749.

The general rule is above all impeachment.

This case may be considered, as it regards,

1st. The license alone.

2d. The license as connected with the transaction itself.

First, then, we contend that no American citizen, in a time of war, has a right voluntarily to place himself under the protection of the enemy. War exists between the nations in their political capacity, and between the individuals of each nation respectively. The power of making peace follows the power of making war. Individuals cannot lawfully make peace even for themselves. But the acceptance of a license from the enemy is making a peace with him so far as it goes—it is a partial truce—a partial cessation of hostilities. Transactions of this kind are productive of great evil. The American citizen who accepts a license from the enemy, does that which is highly injurious to the interests of his country: The indulgence of the enemy imposes on him an obligation to act as a neutral, contrary to his duty as a citizen—it is an individual bribe—it has a tendency to poison the whole virtue and patriotism of the country—to undermine the government—to alienate the affections of the citizens, and to place the nation in the power of the enemy.

The circumstance, that acts of congress have been passed prohibiting trade with the enemy, the use of his licenses, &c. has been urged by the Claimants, as evidence that such communication with the enemy was not unlawful prior to the passage of those acts. But we contend that it was unlawful under a well established rule of the law of nations; and that if these acts have not repealed that rule, they cannot aid the Claimants in the present case. *Sir Wm. Scott's* observations in the case of *the Hoffnung*, are in point. 2, *Rob.* 137, 165.

But we have a special answer to the argument of the

Claimants. The act of July 6, goes upon the presumption that the intercourse with the enemy which it prohibits, was before unlawful—it does not profess to create a new offence.

Considering, then, this point as settled, the argument, that the act of 6th July prohibits the use of licenses to trade with *British* ports only, falls to the ground.

The case of *ransom* has been said to militate with the argument we have employed in support of the illegality of sailing under the protection of the enemy. But the cases are widely different. In a case of ransom, the captured vessel is compelled to make an agreement with the enemy—she is under the necessity of accepting their protection—here the transaction was perfectly voluntary.

The rule of 1756, declaring illegal the coasting trade permitted by the enemy in time of war, which was prohibited by him in time of peace, is founded upon the same general principle. If, then, the *permission* only of the enemy gives a hostile character to vessels sailing under that permission, *a fortiori*, they acquire a hostile character by sailing under the *protection* of the enemy.

But suppose the Claimants in this case did not mean to aid the British, but merely to benefit themselves at the expense of their country and their fellow citizens—still the object of the *license* and the obvious consequence of the voyage, was the supply of the British West Indies. This the Claimants must have known. They knew, also, that the pressure of the West Indies was one of the means which the United States were using to coerce the enemy: yet they become the agents of the British to prevent this pressure. If a neutral carry despatches for one of the belligerent powers, it affords just cause of condemnation to the other: How much stronger is the case of a citizen of one of the belligerent nations furnishing the other with supplies.

It has been said that here was only an *intent* to commit an illegal act, (supposing the act contemplated to

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be illegal,) that there was no *corpus delicti*. But we contend that the very act of sailing with a view to execute the intention, constitutes the offence. Such is the law in case of blockade: if a vessel sails for a blockaded port, knowing it to be blockaded, she thereby acquires a hostile character.

We might here contend that the real destination of the Aurora was not to St. Barts, but to a British port; for it appears that, when captured, she was 160 miles to the leeward of that island: but it is unnecessary to say any thing on this point, as the principle is the same, and the vessel equally liable to condemnation, whether her destination were to a British port or to St. Barts: in the latter case, the cargo, it was well known, would be obtained by the enemy from the Swedes; so that it was, in effect, the same thing as if it had been carried direct to the enemy.

DEXTER, *in reply*.

It is the *universality* of the rule in question we mean to controvert—we deny that there is *such* a general rule. It is not to be found in *Puffendorf*, *Grotius*, *Vattel* or any of the other jurists excepting *Bynkershoek*, whose rules of war are written in blood: and even he has qualified the rule—he says himself that the rule prohibiting all commercial intercourse is that away by the laws of commerce. *Valin* only shows that a particular intercourse is forbidden by the law of France; and, in noticing British insurance, he does not condemn the French for procuring it. The case of *Potts v. Bell* proves that the doctrine in question has but recently been introduced: it is, however, in that case admitted with the exception of those cases where the royal license has been obtained: but this exception must be taken as part of the rule itself: The general principle without the exception would be ruinous to the nation: The inconveniences which would arise from it are incalculable. In 1747, lord Mansfield and sir Dudley Ryder were of a different opinion as to the policy of the rule, and as to the principle of law.

In *Henkle v. the Royal Ex. As. Co.* lord Hardwicke said "It might be going too far to say that all trading

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"with an enemy is unlawful; for the general doctrine "would go a great way even where only *English* goods "were exported, and none of the enemy's imported, "which may be very beneficial."

In this country there has been no decision to establish the rule; and if we take the British rule, we must take it with the power of dispensation: but the president has no such power: the sovereignty has been said to reside in the people: but the remedy by application to congress would be too slow and uncertain. We must conclude, therefore, that in this country no such rule exists.

It has, nevertheless, been contended, by the counsel for the captors, that the rule not only exists, but that it is universal. Is a man, then, bound to abandon all his property which may happen to be in the enemy's country at the breaking out of a war? Such would be the consequence of taking the rule without any exception. Some cases of intercourse with the enemy, it is true, are so palpably illegal as to admit of no doubt on the subject; such as all traiterous intercourse, and perhaps a direct trade; so, also, if the intercourse be in consequence of a new enterprize undertaken since the commencement of hostilities: but many cases must necessarily occur, on the breaking out of a war, which ought certainly to form exceptions: Such is the doctrine in England, where the excepted cases are provided for by the royal license permitting intercourse with the enemy, under certain circumstances and with certain restrictions. In a country, then, where licenses cannot be obtained, all cases where they *would be* granted if a power of granting them existed, must be cases of judicial exception to the general rule. Many occasions may and frequently do occur, during war, on which such intercourse with the enemy would be highly expedient in a political view—occasions where the public good requires an exception; and those, too, cases neither of necessity nor humanity, which must always be excepted.

It is not necessary to inquire whether the mere acceptance of a license is ground of condemnation; it is the *sailing* under a license which constitutes the offence: but

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in our case there was no sailing under the license. The license authorized a voyage to a British, Portuguese or Spanish port: the voyage in the present case was to a port belonging to the Swedes: the letter of Allen, the consul, which has been said to authorize a voyage to a Swedish port also, is entitled to no regard. Admiral Sawyer's letter was the only protection: all the acts of Allen, except certifying that letter, were unauthorized and unofficial; they were no protection to the Aurora. Allen's letter shows, on the face of it, that the voyage to St. Barts was not covered by the license; it merely expresses an opinion that that voyage would answer the purposes contemplated by the British government as well as a voyage to a British port.

It has been said that the real destination of the Aurora was to a British port; and in support of the position, the circumstance of her being considerably to the leeward of St. Barts, when captured, has been urged in proof; but the argument deserves little consideration; it is a verycommon thing to fall to the leeward: besides, it appears that the Aurora had been beating to the windward three days before she was captured, although when she first made the land, there were numerous British ports under her lee.

It has also been argued on the part of the captors, that a trans-shipment from St. Barts to an enemy port was intended: but there is no evidence even of this: nor was there any motive for such trans-shipment: the cargo would meet with as ready a sale at St. Barts as at a British island: the superior advantage of taking in a return cargo at the former place has been already noticed.

But it is said that it was equally criminal to carry this cargo to St. Barts as to a port of the enemy, because the Swedes would probably dispose of it to the British. This argument, also, we conceive to be wholly without foundation: no decision to that effect has ever been pronounced: the case of the island of St. Eustatius, in the last war goes to prove the reverse of this doctrine.

Nothing, therefore, as we conceive, having been proved, on the part of the captors, sufficient to subject the

property in question to condemnation, we trust that the Court, on the consideration of the whole case, will decree restitution to the Claimants.

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*Monday, March 7th. Absent....*TODD, *J.*

LIVINGSTON, *J.* delivered the opinion of the Court.

The ship Aurora and cargo, owned by the Claimants, who are American citizens, and documented as American property, were captured, on the 26th of November 1812, by the private armed ship Governor Tompkins, on an ostensible destination for St. Bartholomews. From the documents on board and the preparatory examinations, it appears that the ship sailed from Newburyport to Norfolk, in ballast, took in her present cargo, consisting of bread, flour, corn, &c. at the latter place, and sailed from thence on the voyage on which she was captured, on or about the 12th of November, 1812. The cargo was consigned to the supercargo of the ship; and the destination thereof upon the ships papers, supported by the preparatory examinations, was St. Bartholomews, for which island the ship obtained her clearance. At the time of capture, she was to the leeward of that island; and certain passports or protections from the agents of the British government were found on board, which are familiarly known by the title of British licenses; which documents are as follows.*

Two questions have been made at bar. 1. Whether the acceptance and use of an enemy's license or passport of protection, on a voyage performed in furtherance of the enemy's avowed objects, be illegal, so as to affect the property with confiscation. 2. If so, whether there is any thing in the present case, to exempt it from the general principle.

The first point having just been decided in the affirmative, in the Julia, it only remains to enquire whether there be any thing in this case to exempt it from the general principle.

In the opinion of a majority of the Court, it is not easy to discriminate between these cases: both of the ves-

* See the statement at the beginning of the report of this case.

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sels had licenses or passports of the same character, and substantially for the same purpose, except only that the object of the Julia was to supply the allied armies in Portugal, and the original intention of the Aurora was to go the British West Indies. It is by no means clear that this destination was ever changed; but admitting that, from an apprehension of seizure in case of her returning to the United States after touching at a British port, she, in fact, sailed on a voyage to St. Bartholomews, this can make no substantial difference in her favor. Her object in going there was equally criminal, and subserved the views of the enemy nearly if not quite as well as if her cargo had been landed in a British island; of the real design of the voyage there can remain no doubt; for it abundantly appears, from the license itself, that the professed object of admiral Sawyer at least, in granting it, was to obtain a supply of provisions for the enemy; and the Court will not easily lend its ear to a suggestion, that notwithstanding the Aurora was found with a British protection on board, of so obnoxious a character, yet her owners intended to deceive the enemy, either by going to a port not mentioned in it, or by disposing of her cargo in a way that would not have promoted his views. Without meaning to say that such conduct may under no circumstances whatever be explained, the Court thinks that there is no proof, in this case, to shew that it was not the intention of the Claimants to carry into effect the original understanding between them and Mr. Allen. For although the destination to St. Bartholomews be conceded, it is evident that Mr. Allen, who acted as British consul, supposed the views of admiral Sawyer might be answered as well in that, as in any other way; nor is it clear, as was said at bar, that the documents which were received from Mr. Allen, which varied more in form than in substance from the admiral's passport, would not have protected her against British capture, on a voyage to that island. The protection of admiral Sawyer extended to unarmed American vessels laden with dry provisions, and *bona fide* bound to British, Portuguese or Spanish ports. The only modification, or extention, introduced by Mr. Allen, was a permission to go to a Swedish island, equally neutral with Spain and Portugal, in the vicinity of the British possessions. Whether all or any of these papers would have saved the Aurora from confiscation in a British Court of admiralty, this Court is not bound

to assert; it is sufficient if that were the reasonable expectation of the parties, as it certainly was, and it is more than probable that such expectation would have been realized, considering the very important advantage which the enemy was to derive from them. In case of capture, there can be no doubt that the Claimants would have interposed these very papers, which are now supposed to have emanated from unauthorized agents, and probably with success, as a shield against forfeiture. Why then, should they be permitted to allege here, that they would have been ineffectual for that purpose?

It is also insisted, that, in this case, no illicit intercourse had actually taken place; that the whole offence, if any, consisted in *intention;* and that if a capture had not intervened, there was still a *locus penitentiæ*, and no one can say that even a project of going to St. Bartholomews might not have been abandoned. In this reasoning the Court does not concur; but is of opinion that the moment the Aurora started on the voyage for St. Bartholomews, with the license in question and a cargo of provisions, she rendered herself liable to capture by the public and private armed ships of the United States, who were not bound to lay by and see how she would conduct herself during the voyage, the consequence of which would be that no right of capture would exist until all chance of making it were at an end.

Judgment affirmed.

THE ADVENTURE, MASTER.

THIS was an appeal from the decree of the Circuit Court for the district of Virginia.

The case of a vessel and cargo, belonging to a citizen of one belligerent nation, captured on the high seas by a cruizer of the other belligerent, given to a neutral, and by

The facts of the case, as stated by JOHNSON, *J.* in delivering the opinion of the Court, were as follow:

The Libellants were the master and crew of the American brig "*Three Friends.*" On the 14th November, 1811, whilst on their voyage from Salem to the Brazils,

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with a valuable cargo on board, they were captured by the Nymphe and Medusa, French frigates, and by them the brig was plundered and burnt. On the 21st, the frigates captured the "*Adventure*," a British ship laden with British goods; and, after taking out a part of the cargo, made a present of the residue to the Libellants. The fact of the gift is established by a writing under the hand of the captain of the Medusa, commander of the squadron, in which he says, "Je donne au capitaine" &c. in the language of an unqualified donation. On the 23d November, they left the squadron, and arrived at Norfolk on the 1st of February, 1812, after a long and boisterous voyage in a large ship navigated by a very inadequate crew. On her arrival in the United States, she was libelled by the captain and crew as their property acquired under the donation of the French captor; and the United States interposed a claim for the forfeiture incurred under the non-importation act. At the time of her arrival, peace existed between this country and Great Britain: but on the 18th of June following, and pending this suit, war was declared.

him brought into a port & libelled in a Court of his own country, between which and the nation to which the vessel originally belonged war breaks out before final adjudication, is to be considered as a case of salvage. One moiety adjudged to the libellants and the other moiety to remain subject to the future order of the Court from which the appeal was brought up; and to be restored to the original owner after the termination of the war, unless legislative provision should previously be made for the confiscation of enemy's property found in the country at the declaration of war.

PINKNEY, *for the Libellants*,

Said it was not his intention, at this time, to inquire whether or not this be a case for condemnation under the non-intercourse act of March 1, 1809; He did not mean to deny that it is *not*. Waving that question, therefore, for the present, he contended that the property in controversy is either, a *droit of admiralty* subject to salvage, or that it is to be considered as derelict. But no evidence has been produced in support of the latter supposition. It must therefore be considered as a case of the former description, and a case too, of the most meritorious character.

The act of bringing in the cargo, though consisting of articles the importation of which was prohibited by law, was not considered, under the peculiar circumstances

If this be conceded, the next question is, what rate of salvage shall be allowed? The English rule on this subject is fixed only in the case of re-capture by government ships and privateers. The salvage allotted to the first, is at the rate of one eighth of the beneficial interest in the whole re-captured property; to the last, one sixth. In all other cases, the judge of the Court is at liberty to order such salvage as he shall deem reasonable. Some-

times the whole property saved is allowed—sometimes the moiety only, and sometimes less. The present case is one of *extraordinary* merit. THE ADVENTURE,

In the Court below, two points were made in behalf of the United States: MASTER.

of this case, as subjecting the property to forfeiture.

1. That this was a case of forfeiture under the non-intercourse act of 1st of March 1809; and if not, then,

2. That it was a case of salvage, and the rate to be allotted discretionary with the Court.

JOHNSON, *J.* here suggested a doubt whether it was not a case under the non-intercourse act; and asked whether the United States could rightfully seize the property in question as a *droit of admiralty*, in port, or any other British property on the land. He also observed that there might be some difficulty with regard to the allotment of salvage, should this prove to be a case of that kind.

HARPER, *for the Libellants.*

On a capture of a vessel, the right of the captors is only inceptive: In order to complete that right, it is necessary to prosecute it to the condemnation of the vessel in a Court of competent jurisdiction. In the present case, the French captors transferred their right, whatever it was, to the American master and crew. Could they lawfully do this? The decision of the question depends upon the doctrine relative to the transfer of a *chose in action.* We contend that they could; and that the transferees were consequently entitled, as captors, to prosecute the original capture.

But if the Libellants are not entitled as captors, then it is a question whether it be a case under the non-intercourse act, or a case of salvage.

In order to bring it within the meaning of the non-intercourse act, it must be shown that there was an intention to import for sale or use—that there was a *voluntary* importation, and that the importation was from a foreign port or place. But here, there was no such intention.

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here was no *voluntary* importation; and no importation, as we conceive, from any *foreign port or place* within the meaning of the act; here was no intention to infract any law whatsoever; it was a case of clear necessity: the master and crew were obliged to bring in the ship to save their own lives.

But it may perhaps be said that though it was necessary to bring in the ship, it was not necessary to bring in the cargo. What then was to be done with it. Was it to be thrown into the sea? The British owner was not divested of his right. Such an act, therefore, would have been inconsistent with the neutral character which it was the duty of all Americans to preserve towards Great Britain, with whom we were then at peace. We conceive that the course pursued by the Libellants, was unexceptionable. They proceeded openly to the United States, and, immediately on their arrival, delivered up the property to be disposed of according to law. There is no appearance, throughout the whole transaction of the smallest intention to violate any law whatever.

It must, therefore, be considered as a case of salvage; and had the relations between Great Britain and the United States continued as they were at the time of the importation, the residue of the property in question, after deducting the salvage, must have been restored to the British owner.

But the declaration of war has altered the nature of the case: The ship and cargo have now become enemy property, and, as such, are claimed by the American government, subject, however, to the right of the libellants.

What salvage is to be allotted to us, the Court will decide. Our case is certainly one of great merit: we were, for more than two months, exposed to the perils and hardships of a long and boisterous voyage; and that, too, in a large ship to the management of which the small crew on board was by no means adequate. Less than half the amount of the property would not we conceive, compensate us for the trouble and danger we have incurred.

PINKNEY, observed that he had not considered this as a case coming within the meaning of the non-intercourse act, and had therefore waved the discussion of that point: he still doubted whether there were sufficient grounds to support it. The law only prohibits importations from a *foreign port or place.* In cases of trans-shipment, it may perhaps be said that the property trans-shipped is imported from a foreign place: but here was no trans-shipment, no change of vessel: here, the property is imported from the *high seas,* which can hardly be considered as coming within the description of a foreign port or place. He did not mean, he said, to enter into a formal argument. He would, however, observe that, in his opinion, the captors, in the present case, could not complete their right to the property in question by means of a neutral master and crew, even if the British owner was divested of his right.

RUSH, *Attorney general,* conceived that the high seas might be considered as a foreign place; that the cargoes of whale-ships from the Pacific, such as oil, whalebone, blubber, &c. which originate from the sea, might be considered as within the meaning of the non-intercourse act. He suggested that the word *place,* in the act, was probably used in contradistinction to *port.*

MARSHALL, *Ch. J.* In the Circuit Court the high seas were considered as common to all nations, and, of course, *foreign* to none.

PINKNEY, said this was a case of very considerable difficulty. How is the property to be disposed of? It cannot be decreed to the United States, for it is not a case under the non-intercourse act, nor was the seizure *jure belli*: A prize Court had no jurisdiction: for the seizure was in time of peace, for a supposed violation of the non-intercourse law, and after the property was landed: It cannot be decreed wholly to the Libellants, because it must be considered as a case of salvage. Nor can it be restored to the original owner, because he is an alien enemy.

*Monday, March 7th. Absent....*TODD, *J.*

STORY, *J. did not sit in this cause, some distant relative of his having an interest in it.*

THE ADVENTURE, JOHNSON, *J.* after stating the facts of the case, as before mentioned, delivered the opinion of the Court as follows:

MATTER. The very peculiar circumstances of this case require the application of a variety of principles; and the Court has not been aided in its enquiries, by that elaborate discussion which such novel cases generally elicit. But they are relieved by the reflection, that the principles to which they must resort in forming their judgment are well established, and lead satisfactorily to a conclusion.

The most natural mode of acquiring a definite idea of the rights of the Libellants in the subject matter, will be, to follow it through the successive changes of circumstances by which the nature and extent of the rights of the parties were affected. The capture, the donation, the arrival in the United States, and the state of war.

As between the belligerents, the capture undoubtedly produces a complete divesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations, has subjected all such captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany ships that have been captured, for the purpose of proving that the seizure was the act of sovereign authority, and not mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a Court of competent authority, or will dispossess the purchaser of a ship originally British—(*the Fladoyen*, 1, *Rob.* 114, 135.) Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize-master navigating the prize, in pursuance of orders from his commander. The vessel remained liable to British capture on the whole voyage. And, on her arrival in a neutral territory, the donee sunk into a mere bailee for the British Claimant, with those rights over the

thing in possession which the civil law gave for care and labor bestowed upon it.

The question then occurs, is this a case of salvage?

On the negative of the proposition it is contended, that it is a case of forfeiture, and therefore not a case of salvage as against the United States—that it was an unneutral act to assist the enemy in bringing the vessel *infra presidia*, or into any situation where the rights of re-capture would cease, and therefore not a case of salvage as against the British Claimant

But the Court entertain an opinion unfavorable to both these objections.

This could never have been a case within the view of the legislature, when passing the non-importation act. The ship was the plank on which the ship-wrecked mariner reached the shore; and although it may be urged that bringing in the cargo was not necessarily connected with their own return to their country, yet, upon reflection, it will be found, that this also can be excused upon very fair principles. It was their duty to adhere strictly to their neutral character; but to have cast into the sea the cargo, the property of a belligerent, would have been to do him an injury by taking away that chance of recovery subject to which they took it into their possession. Besides, bringing it into the United States, did not necessarily pre-suppose a violation of the non-importation laws. If it came within the decription of property cast casually on our shores, as we are of opinion it did, legal provision exists for disposing of it in such a manner as would comport with the policy of our laws. At last, they could but deliver it up to the hands of the government, to be re-shipped by the British Claimant, or otherwise appropriated under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violation of the laws of the country, upon their arrival here they deliver it up to the custody of the laws, and leave it to be disposed of under judicial sanction. The case has no one feature of an illegal importation, and cannot possibly have imputed to it the violation of law.

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As to the question arising on the interest of the British Claimant, it would, at this time, be a sufficient answer, that they who have no rights in this Court, cannot urge a violation of their rights against the claim of the Libellants. But there is still a much more satisfactory answer: To have attempted to carry the vessel "*infra presidia*" of the enemy, would, unless it could have been excused on the ground of necessity, have been an unneutral act. But when every exertion is made to bring it to a place of safety, in which the original right of the captured would revive and might be asserted, instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the English Claimant.

It being determined to be a case of salvage, the next question is, as to the amount to be allowed. On this subject there is no precise rule; nor is it, in its nature, reducible to rule. For it must, in every case, depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, &c. all of which must be estimated and weighed by the Court that awards the salvage. As far as our enquiries extend, when a proportion of the thing saved has been awarded, a half has been the *maximum*, and an eighth the *minimum*; below that, it is usual to adjudge a compensation *in numero*. In some cases, indeed, more than a half may have been awarded; but they will be found to be cases of very extraordinary merit, or on articles of very small amount. In the present case, the account sales of the cargo was near $16000; and we are of opinion that the one half of that sum will be an adequate compensation.

The next question arises on the application of the residue. On this point, the Court is led to a conclusion by the following considerations.

At the arrival of the vessel in the United States, the original British owner would, unquestionably, have been entitled to the balance. The state of war, however, at present, prevents his interposing a claim in the Courts of this country. But as this property was found within the United States at the declaration of war, it must stand on the same footing with other British property similarly situated. Although property of that description is liable to be disposed of by the legislative

power of the country, yet, until some act is passed upon the subject, it is still under the protection of the law, and may be claimed after the termination of war, if not previously confiscated. We will, therefore, make such order respecting it, as will preserve it, subject to the will of the Court, to be disposed of as future circumstances shall render proper.

As to the mode of distributing the amount of the salvage, the Court have concluded to adopt an arbitrary distribution; because there exists no positive rule on that subject. They would have adopted the rules of the prize act relative to cases of salvage, had the circumstances of the case admitted of its application.

This Court orders and decrees, that the decree of the Circuit Court of Virginia, in this case, be reversed; that the costs and charges be paid out of the proceeds of the sale; that the one half of the balance be adjudged to the Libellants, to be divided into thirteen and a half parts, three of which shall be paid to the captain, two to the supercargo, two to the chief mate, one and a half to the second mate, and one to each of the seamen. And that the balance be deposited in the bank of Virginia, to remain subject to the future order of the Circuit Court.

JOHN GREEN *v.* JOHN LITER AND OTHERS.

THIS was a writ of right brought by Green, the Demandant, against the tenants, to recover seizin of a large tract of land lying in Kentucky, and set forth in the count. The writ of right was sued out under the act of the Virginia assembly, entitled "an act for reforming the method of proceeding in writs of right."

The Circuit Courts of the U. S. have jurisdiction in writs of right, where the property demanded exceeds $500 in value; and if, upon the trial the demandant recover less, he is not to be allowed his costs; but, at the dis-

At the trial in the Circuit Court for the Kentucky district, several questions arose upon which the Court was divided; whereupon those questions were certified for the opinion of the Supreme Court. They are as follows:

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1st. Has the Circuit Court of the United States jurisdiction in a writ of right, where the land claimed by the Demandant is above the value of $ 500, but the tenement held by the tenant is of less value than $ 500?

2d. Can the Demandant join in the writ and count several tenants claiming under several distinct, separate and independent original titles, all of which interfere with the land of the Demandant? If he can, must he demand of them the tenements they severally hold, or may he demand a tenement to the extent of his own title? If it comprizes a part not claimed or held by any of the said tenants, may he demand, in his count against the several tenants, his own tenement, or must he demand of each tenant the tenement he severally holds?

3d. Can the tenant, under the act of the Virginia assembly for reforming the method of proceeding in writs of right, plead in abatement either the plea of non-tenure, joint tenancy, sole tenancy, several tenancy, or never tenant of the freehold, or any of them, or other pleas in abatement necessary to his case; or is he compellable to join in the mise in the form prescribed by the said act? If he can, when or at what stage of the proceedings? If he cannot, may he give it in evidence on the mise joined?

4th. May the tenant, under the said act, plead specially any matter of bar, or must he join the mise, without other plea, in the form prescribed by the said act?

5th. Can a Demandant who has regularly obtained a patent from the land office of the state of Virginia for the land in contest, under the act of the Virginia legislature, passed in the year 1779, commonly styled the land law, maintain a writ of right, under such patent, against a person claiming and holding possession under a younger patent from the said state, without having first taken the actual possession of the land, under his patent, held by the tenant? If he can maintain a writ of right without such proof in the general, can he do it where his right of entry is barred by an actual adverse possession of twenty years?

6th. Is the eldest patent, obtained, as aforesaid, for

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cretion of the Court, may be adjudged to pay costs. At common law, a writ of right will not lie, except against the tenant of the freehold demanded. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead in abatement of the writ. If the demandant demands against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden; but the writ shall abate only as to the parcel whereof non-tenure is pleaded and admitted or proved. Under the act of Kentucky, to amend process in chancery and common law, the party may recover, although he prove only part of the claim in his declaration; but it does not enable him to

the land in controversy, sufficient proof of the best mere right; or can the Demandant be put on the proof that, in the incipiency, and in the different steps necessary to complete his title, he has complied with the requisites prescribed by the acts, the one entitled "an act for adjusting and settling the titles of Claimants to unpatented lands under the present and former government, previous to the establishment of the commonwealth land office," and the other, "an act for establishing a land office and ascertaining the terms and manner of granting waste and unappropriate lands," and the subsequent laws of Virginia on the same subject, in force at the time of the erection of the district of Kentucky into a separate state?

join parties in an action, who could not be joined at the common law. The act of Virginia of 1786, reforming the method of proceeding in writs of right, did not vary the rights or legal predicament of the parties, as they existed at the common law. It did not therefore change the nature and effect of the pleadings; and notwithstanding that act, the tenant shall still have the full benefit of the ordinary pleas in abatement. The clause of the act which provides that the tenant at the trial, may, on the general issue, give in evidence any matter which might have been specially pleaded, is confined to matters in bar. Under the act of Virginia of 1786, the tenant may, at his election, plead any special matter in bar in a writ of right, or give it in evidence on the mise joined. The

7th. If the Demandant is not compellable to shew any thing beyond his patent, can the tenant holding the younger patent be permitted to impeach the Demandant's patent, to shew the incipiency and completion of his own title, and the relative merits of his own and the Demandant's title?

8th. Can the Defendant defend himself by shewing an older and better existing title than the Demandant's, in a third person?

9th. Where several tenants, claiming in severalty, are joined in a writ of right, should the finding of the jury be several of the mere right between the Demandant and each tenant, or may it be a general finding that the Demandant hath the most mere right?

10th. The commonwealth having first made and granted a patent to the Demandant, and afterwards, by her patent, granted a part of the same land to the Defendants, who entered and obtained the first possession, the Demandant afterwards entered and took possession, under his first grant, of that part of his land not within the patent of the first grantee—who has the best mere right to the land, where the patents conflict, outside of the actual close of the last grantee?

11th. Will an entry upon part, and taking the esplees under the elder grant from the commonwealth, and making claim to the whole land included within the bounds of the elder grant, authorise the Demandant to maintain

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his writ of right against the tenants holding the previous possession under a younger patent interfering with the elder grant?

WICKLIFFE, *for the Demandant.*

act is not compulsive, but cumulative. The act of Virginia of 1786 did not change the nature of the inquiry as to the titles of the parties to a writ of right. In order to support a writ of right, it is not necessary to prove an actual entry under title, or actual taking of esplees. A constructive seizen in deed is sufficient.

The Court below being divided in opinion upon the several questions already stated, they have been adjourned to this Court. The questions themselves sufficiently shew the controversy. And the several points will be examined as they present themselves on the record.

With regard to the *first*, we contend that the Circuit Court has jurisdiction in the case therein stated; and that the Defendant's only remedy, in such case, under the act of congress, is, that he shall be excused from paying costs, and that he may, at the discretion of the Court, be allowed his costs. In support of this point, we rely on the judicial act of 1789. *Laws U. S. vol. 1, p. 47, 1 Sess. 1 Cong. ch. 20. § 11 & 20.*

Under the land law of Virginia, the whole legal estate & seizin of the commonwealth pass to the patentee, upon the issuing of his patent, in as full and beneficial a manner, (subject only to the rights of the commonwealth) as the commonwealth itself held them. A conveyance of wild and vacant lands gives a constructive seizin thereof, in deed, to the grantee, and attaches to him all the legal remedies incident to the estate. A fortiori, this

2d. Upon the *second* question, we contend, in behalf of the Demandant, that under the act of assembly of Virg. Rev. Co. P. P. 34, if his tenement is an entire one, and interfered with by divers tenants, he can only demand his tenement as it is, and cannot know how the adverse Claimants bound or abut their claims or possession; and that as all claim and obstruct him in the use and possession, he has a right to sue all. We contend, further, that although the Demandant claim more than the tenants or either of them hold, still he may recover as much as is withheld from him by the tenant or tenants. To support this possition we rely upon the act of assembly of Virginia of 1792, ch. 125, which is in force in Kentucky and is the same in substance with the act of 25 Edw. 3, ch. 16, which enacts "that by the exception of non-tenure of parcel no writ shall be abated but for quantity of the non-tenure which is alleged;" and the act of assembly of Kentucky, entitled "an act to amend proceedings in chancery and common law;" the latter of which acts expressly provides, that if the Plaintiff at law shall prove part of his demand or claim set up in his declaration, he shall not be non-suited, but shall have judgment for what he proves. See also, *Boothe on real actions, p. 2.*

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3d. On the *third* question, we insist, that, under a sound construction of the act of assembly of Virginia of 1786, (revised code, vol. 1, p. 38, ch. 27,) no matter in abatement which does not affect the right can be pleaded. But if it can be pleaded, yet, under the acts of assembly of Kentucky, and the rules of the Circuit Court of the district of Kentucky, it ought to be pleaded during the appearance term, and be supported by oath. It is further insisted, that only such matters as assume the character of abatement at common law, and which affect the mere right, such as non-tenure, can be given in evidence on the *mise* joined. A contrary construction of the act would lead to the worst of consequences. If, upon the *mise* joined, all matter in abatement might be given in evidence, a man might lose his valuable inheritance by the Defendant proving on the trial that he claimed and held as joint-tenant, and not as sole tenant. It would also involve the monstrous absurdity of making the jury the sole and exclusive judges of the Demandant's count and pleading.

principle applies to a patent. In Kentucky, a patent is the completion of the legal title; and it is the legal title only that can come in controversy in a writ of right. A better subsisting adverse title in a third person, is no defence in a writ of right. If tenants claiming different parcels of land by distinct titles, omit to plead that matter in abatement, and join the mise, it is an admission that they are joint tenants of the whole; and the verdict, if for the Demandant for any parcel of the land, may be general, that he hath more mere right to hold the same than the tenants; and if of any parcel for the tenants, that they have more mere right to hold the same than the Demandant. If a man enter into lands, having title, his

4th. The *fourth* proposition seems to be abstract and indefinite. If the matter in bar affects the mere right, and goes to shew substantially that the Demandant has no claim in fee simple, it is submitted to the Court to say, whether, under a just construction of the act, he can plead it. But as the act allows him to give such bar in evidence on the general issue, it is within the sound discretion of the inferior Court, to permit the Defendant to plead the special matter, or give it in evidence on the general issue; and that must depend upon the time when the application is made. On this point, the case of *Resler v. Sheehee*, 1 *Cranch*, 110. and the case of *Fox and White*, in the Court of appeals in Kentucky, are relied upon. It is further submitted, whether the mere etiquette of pleading and the time when that pleading shall be filed, is not a matter of practice *only*, and proper to be left to the Circuit Courts to settle under their own rules or the statutes and practice in Kentucky.

5th. The *fifth* question seems to be a more important one; and it would have been, perhaps, more regular to have placed that before the other questions, inasmuch as a decision upon that, affirmatively, would preclude the necessity of deciding several of the others.

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Upon this question we contend that the Demandant can, *upon his patent*, maintain his writ of right; and that actual possession is not necessary. To maintain this point it is not at all material to prove that by the king's letters patent granting titles to land in England, a writ of right could be maintained. It is believed that no case has occurred where that point has been directly decided. But titles in England are conditional, not absolute. Since the time of William the conqueror, all grants of land have been made on feudal principles; and a patent in England is not of itself a right, but an authority to the grantee to take a right; that right rests upon conditions; and one of those conditions is entering and taking possession of the land. In the grant there are two parties *supposed*, the king and grantee; and the grantee becomes bound to the king when he accepts the estate, and not till then; the ultimate property remains with the king; and upon the tenant's entering, he becomes seized of the use only; and hence exists the reason, in the English books, of requiring the Demandant, in the most solemn trial of a right to real estate, to shew and prove the highest title the subject ever had, the *dominium utile*, or usufruct of the property; for if neither he nor his ancestor had entered and been seized of the use, (the *dominium directum* remaining in the king,) they never had a fee simple estate; the feudal grant not being an estate in fee, but a right to enter and take one; and if that right was never exercised, the estate was never taken. See *2 Bl. Com.* 46. 104, 105, 107. 108. It appears, also, further, from *Boothe, and Fitz. Nat. Brev. tit. writ of right, letter F*, that the Demandant had not only to set out when he was seized, but by what service he held the land.

seizin is not bounded by his actual occupancy, but is held to be co-extensive with his title. But if a man enter without title, his seizin is confined to his possession by metes and bounds

An entry into a parcel which is vacant, will not give seizin of a parcel which is in an adverse seizin; but an entry into the last parcel, in the name of the whole, will enure as an entry into the vacant parcel.

Under a conveyance, taking effect under the statute of uses, the bargainee has a complete seizin in deed without actual entry or livery of seizin.

It is important to state the kind of title made by letters patent such as those under which the Demandant claims. In 1777, the legislature of Virginia abolished all servile and feudal tenures; and, in 1779, passed her land law, under which we derive title. In one section of that act, the form of an allodial grant is given; and, by way of closing every doubt as to the title, the Register was directed to endorse that the patentee had title. Having provided, in that section, for the complete investment of an absolute and unconditional title under that act, and actuated by a laudable desire to place all

her citizens upon the same tenure, in the 19th section of the same act she declares, "that all reservations and "conditions in the patents or grants of land from the "crown of England or of Great Britain, under the for- "mer government, are hereby declared to be null and "void; and that all lands thereby respectively granted "shall be held in absolute and unconditional property, to "all intents and purposes whatsoever, in the same man- "ner with lands hereafter to be granted by the common- "wealth, by virtue of this act." And by a subsequent section of the same act, all laws requiring the seating or possession of land to *vest title*, are expressly repealed. It will be perceived that the legislature not only gave the form of a patent such as never had been issued before in that state, but provided that an indorsement should appear on the back of the letters patent, that the grantee had title, no such endorsment ever having been made or allowed during the regal government. But lest the titles might, in some manner, be tinctured with the learning of the feudal law, they explicitly declare that the estate shall be held in absolute and unconditional property. It might here be asked, can any man say that the patent of the commonwealth, issued in strict pursuance of this act, does not convey a fee simple estate, without any condition being performed by the patentee? To us it seems that this is a point too clear for doubt.

The attention of the Court is next called to the act of 1786. That act, in its title and context, professes to be an act to reform the method of proceeding in writs of right; and expressly provides, that it shall be lawful for a person claiming a fee simple title to sue forth the *præcipe quod reddat*, &c. This act gives the writ. If the Demandant has a fee simple estate, (and the only question which can be involved is, has the Demandant, by these letters patent, a fee simple estate,) a further argument is drawn from the fact of passing the act itself. The necessity of this reform had become obvious to the legislature and the people of Virginia, from the great and radical change of the land titles created by the act of 1779. That act had repealed all laws which required claimers of land to settle them; had repealed and abolished every service and tenure by which lands in that state had been theretofore held. Of course the form of the count at common law was totally defective and im-

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proper; because that contained not only the charge of actual seizin, but the time when, and by what kind of service the lands were held. The common law titles having ceased, the remedy ceased also; it then well became the legislature to give a statutory remedy suited to the statutory and then existing state of titles; and thus you find a form of *præcipe* and count given, precisely corresponding with the title. The act of 1779 abolished all the feudal tenures, and dispensed with actual possession; and the old allegations of possession and the kind of tenure, are omitted. This omission means something; and why did it take place if not for the causes now assigned? See, on the foregoing points, *Cruise on Real Estates*, 12.—*Co. Litt. folio* 48.—*Ch. Rev.* 61.

The form of the writ and count is very obviously taken from the British forms; and is not only the *act* of a legislature famed for its wisdom and learning, but report makes this form the peculiar work of a committee of the first lawyers then of the Virginia bar. To ascribe such unmeaning omissions to such men and to such a body, is wholly inadmissible.

But surely, on common law principles, it cannot be fairly contended that the Demandant shall prove actual possession. The statute has given him his count or declaration. That count will, it is believed, be sufficient for him after verdict; and if a man proves every thing he has alleged upon a good declaration, we understand the common law to be, that he shall have a verdict. If you require of the Demandant to prove more than his count contains, where will you stop? If you say that after he proves and exhibits a fee simple title, he shall also prove possession, why not say that he must prove by what tenure he holds, and whatever else he was bound to prove at common law; and which were equally indispensable to be proved before this statute? The case of *Clay v. White*, 1 *Munford*, 162, will be relied on to prove that the patentee is, to every legal purpose, possessed of land, in Virginia, by his letters patent. Upon this point, the attention of the Court is farther called to the state of the country at the date of the Virginia land law. It was in the midst of a war with Great Britain; when sound policy required that many of the grantees who were engaged in the war (the offi-

cers and soldiers) should remain in it during its continuance; and that those not engaged should, to a certain extent, be drawn into its armies. In fact, this very land office was opened with the two-fold view of raising men and money to carry on the war. It is therefore asked, if the objects of the legislature would not have been defeated if the very bounty offered for the public service, and which might be the price of the blood of the father to the children, should depend upon seating and possessing the land? For if the doctrine obtain, that actual possession is necessary to a perfect title, or to give a fee simple estate, it is incontrovertible (by the rules of the common law) that the death of the grantee before entry, prevents the estate from descending; that the grantee cannot sell nor devise a mere right of entry; and that, by the bare attempt to do the one or the other, he works a forfeiture. See *Co. Litt.* 214, 266, and *Noy's Maxims*, 84. It is believed that one third of the best lands in Kentucky are held by devise, purchase, or descent, without the original grantee ever having been possessed. With what astonisment will the Virginian or Kentuckian learn, for the first time, the monstrous doctrine that destroys every estate of the kind. Again, with the exception of four small forts or stations, the whole territory which now forms the state of Kentucky was, at the date of the law, a wilderness, in the possession and under the power of the Indians. In fact, a considerable part granted out by the state, below the Tennessee, is yet held, and may be held for a century, by the Indians. And can it be supposed that Virginia could have intended, when she invited the soldier and the capitalist to embark their fortunes in the war, and offered as a reward these lands, to have imposed the necessity of actual settlement and taking the esplees as a pre-requisite to *title?* What are the esplees of a wilderness under the dominion of the tomahawk and the scalping knife? Are they the game or the wild acorns? If we be correct in supposing that the commonwealth vests in the Demandant, in this case, a fee simple estate, and legally possesses him of that estate, it follows, that nothing less than an adverse possession of thirty years can bar him; and that twenty years is not a sufficient bar. In support of the foregoing observations, see *Ch. Rev. p.* 97—*id. p.* 98, *sec.* 6—1. *Rev. Code of Vir. Laws, p.* 33—*id. p.* *Noys Max-*

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ims, 160—*Co. Litt.* 48, *note*—*Boothe.* 112—*id.* 98—*Harding's (Kentucky) Reports*, 162, *Bradford v. Patterson.* *Sneed's Reports*, 237, *Brown v. Quarles*—*Co. Litt.* 57—*Fitz. N. B.* 506, *note*—*Rev. Code, ch.* 114.

6th. On the *sixth* question proposed, we contend that the first patent conveys the legal estate in fee; that the incipiency of title was a matter between the commonwealth and the patentee; and, when settled with the commonwealth, and the title made perfect, that it does not lie in contest between the Demandant and Defendant. We contend, also, that, in a trial at law, of a mere legal right, the Defendant cannot set up an equity against the elder grant. This point was settled by the Court of appeals of Kentucky, in the old case of *Brown v. Quarles*, and has ever since been considered the law of that state.

8th. On the *eighth* question, we contend that the *mise* is joined upon the mere right between the Demandant and Defendant; and that the jury is to inquire whether the Demandant hath more right, &c. or the Defendant, &c. and that it will be absurd to inquire whether the Demandant or some one else hath the most mere right.

9th. On the *ninth*, it may be observed, that it must depend upon the manner in which the *mise* is joined. If the tenants jointly and severally join the *mise* upon the whole land claimed by the Demandant in his count, then a general finding will be proper. But if they severally plead as to part, and disclaim or plead non-tenure as to the rest, then the finding should be several, and respond to each issue.

10th. On the *tenth*, we contend that an entry into part in the name of the whole, and claiming the whole, will, on common law authority, sustain the writ and count as to all claiming under a younger and inferior right, that have not had thirty years adverse possession; and, of course, that the land in the Demandant's patent and outside of the close of the Defendant, belongs to the Demandant.

11th. The observations upon the tenth question will apply to this also.

HUGHES, *contra.*

The *fifth* question being the most important, and that to which the Demandant's counsel has principally directed his attention in the course of his argument, I shall confine my observations also, chiefly to that point.

The Virginia act of assembly of 19th December, 1792, which declares that "actual possession need not be proved to maintain a writ of right," was passed after the separation of Kentucky from Virginia; and consequently is not in force in the former state.

At common law, a writ of right cannot be maintained without proof of seizin in the Demandant, and actual taking of esplees within the time of limitation; which, in England, is thirty years on a man's own seizin, and fifty, on the seizin of his ancestors; and such was the law of Virginia untill the year 1786, when the act for reforming the method of proceeding in writs of right, was passed. But this act merely changed the mode of trial, not the substance of proof. It did not dispense with proof of the Demandant's seizin; and, consequently, the law on that subject remains the same as before the passage of the act of 1786. Vid. *Boothe*, 85, 111, 112.—*Co. Litt.* 281, 393, 294.—2 *Saund.* 45, 46.—*Bac. Abr. Tit. Limitation of Actions, B.*—4 *Rep.* 8. *Bevill's case.*—*Old laws of Virginia*, 147.

From the case of *Tisson v. Clarke*, 3. *Wills.* 419, it appears, that if the tenant did not pay his demi-mark, and deny the seizin of the Demandant, such seizin was taken for confessed. Hence the Defendant was put to prove his title, contrary to the general rule. *Vid.* the case of *Tisson v. Clarke*, 3 *Wils.* 419.—*id.* 541.—*Co. Litt.* § 514. —*Boothe*, 113.—But the legislature of Virginia, by omitting to require the allegation of seizin, made it necessary that the Demandant should prove it. If it had been alleged, and not denied, such proof, on the part of the Demandant, would not have been necessary.

Although, according to the decision of the Court of appeals of Kentucky in the case of *Innis and al. v. Crawford*, (M. S. report) the patent conveys a fee simple estate, yet the patentee must so use it as not to lose his es-

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tate, and in such a manner as to prevent the operation of the statute of limitations. A patentee may lose his right by not entering in due time; and, in such case, having nothing superior to a right of entry, he cannot maintain a writ of right. At the time of the separation of Kentucky from Virginia, the statute of limitations of Virginia was, *verbatim*, the same as the statute of 32d of Henry VIII. c. 2. on which it has been decided, that seizin was necessary within fifty years. Vid. the M. S. report of the case of *Sprigs v. Griffith*, decided in Kentucky—also, the M. S. report of the case of *Speed v. Buford*, decided in the Court of appeals of the same state, in May, 1813.

But admit that a patent is equivalent to livery *in law*; we contend that livery *in fact* is necessary; and so must the case of *White v. Clay* in 1. *Munf.* 162, be understood. *Co. Lit.* 240, *b*—*id.* 111—*Shep. Touch.* 209, 223.

The reason of the law requiring proof of actual possession, is obvious: such proof was required in order to secure the peaceable occupancy of the land to the rightful proprietor. Investiture and seizin were invented for the purpose of putting an end to litigation. They were notorious acts in the country, performed in the presence of the vicinage; and where there had been such actual seizin and investiture, the law, after the right of entry was gone, gave the Demandant the writ of right to revive his former possession. 2. *Bl. Com.* 311, 312, *Shep. Touch.* 209.

It is true that, according to the old law, a charter of feoffment, without actual livery, only gave an estate at will; and the statute of uses transfers the possession in law to the *use*; but no change was made thereby in the law respecting writs of right, which requires proof of actual possession.

With regard to the other questions adjourned, the counsel for the tenants contended,

As to the 1st. and 2d. points, that the Demandant could not join, in the writ and count, several tenants claiming under several distinct, separate and independent original titles; and that, as they could not be joined, the Circuit Court had no jurisdiction; inasmuch

as no one of the tenements in question was of the value of $ 500.

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As to the third point, that non-tenure, no seizin, &c. might be pleaded under the act of Virginia, of 1786.

The 4th point he submitted.

On the 6th and 7th, he contended that the patent was not conclusive evidence in a writ of right.

On the 8th, he supported the affirmative of the question.

The 9th, he said respected matter of form merely.

As to the 10th, he insisted, that when a man takes possession, he takes possession to the extent of his claim.

The 11th, he said was answered by the observations on the 1st point.

WICKLIFFE, *in reply.*

Contended, that the Kentucky cases cited by the tenant's counsel, not being final and absolute, were not authority; that the Court of appeals of Kentucky was, in fact, waiting for the decision of this Court, in these cases. But admitting them to be authority, still there was error in the finding of the jury; they had found a special verdict, which, by the common law, they could not do; they ought to have decided the mere right, and nothing more.

In the case of a grant from the crown of the same land to two different persons, if the last grantee enter, the former may maintain trespass.

In the case of *Innis v. Crawford*, the Court, in effect, said, that the patent gave seizin; because they dated the *disseizin* by the tenant, from the date of his entry; but if the demandant was not seized, he could not have been disseized.

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The Court of appeals of Virginia, at different times have decided differently on the same law; but the Courts of Kentucky have always decided, that when the reason of the English law ceased in consequence of the different circumstances of the country, the law itself ceased.

Friday, March 11th. Present....All the Judges.

STORY, J. delivered the opinion of the Court as follows:

This is a writ of right brought by the Demandant against the tenants, to recover seizin of a large tract of land set forth in the count. At the trial in the Circuit Court for Kentucky district, several questions arose upon which the Court were divided; and these questions are now certified for the opinion of this Court.

As to the first question, we are satisfied that the Circuit Court had jurisdiction of the cause. Taking the 11th and 20th sections of the judicial act of 1789, ch. 20, in connexion, it is clear that the jurisdiction attaches where the property demanded exceeds $ 500 in value; and if, upon the trial, the Demandant recover less, he is not allowed his costs; but, at the discretion of the Court, may be adjudged to pay costs.

As to the second question, we are of opinion that, at common law, a writ of right will not lie, except against the tenant of the freehold demanded. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead in abatement of the writ. If the Demandant demands against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden; and this plea, by the ancient common law, would have abated the whole writ. But the statute 25, Edw. 3, ch. 6, which may be considered as a part of our common law, having been in force at the emigration of our ancestors, cured the defect, and declared that the writ should abate only as to the parcel whereof non-tenure was pleaded, and admitted or proved. In fact the act of Virginia of 1792, ch. 125, which is in force in Kentucky, enacts substantially the same provision as the statute of Edward.

But it is supposed, in argument, that the act of Kentucky, to amend proceedings in chancery and common law, which provides that if the Plaintiff at law shall prove part of his demand or claim set up in his declaration, he shall not be non-suited, but shall have judgment for what he proves, entitles the Demandant in this case to join parties who hold in severalty by distinct titles.

To this doctrine the Court cannot accede. At common law, in many instances, if the party demanded in his writ more than he proved was his right, he lost his action by the falsity of his writ. It was to cure this ancient evil that the act of Kentucky was made. It enables the party to recover, although he should prove only part of the claim in his declaration. But it does not tend to enable him to join parties in an action, who could not be joined at the common law. It could no more entitle a Demandant in a real action to recover against several tenants claiming by distinct and separate titles, than it could entitle a Plaintiff to maintain a joint action of assumpsit, where the contracts were several and independent. Infinite inconvenience and mischief would result from such a construction; and we should not incline to adopt it, unless it were unavoidable.

As to the third question. It is clear, at the common law, that non-tenure, joint-tenure, sole-tenure and several-tenure, were good pleas in abatement to a writ of right. But they could only be pleaded in abatement; for the tenant, by joining the mise, or pleading in bar, admitted himself tenant of the freehold. Such pleading in bar was an admission that he had a capacity to defend the suit; and he was estopped, by his own act, from denying it. The act of Virginia of 1786, ch. 27, reforming the proceedings on writs of right, was not intended to vary the rights or legal predicament of the parties. It did not, therefore, intend to change the nature and effect of the pleadings; and, notwithstanding that act, the tenant shall still have the full benefit of the ordinary pleas in abatement. It is true that the act provides that the tenant, at the trial, may, on the general issue, give in evidence any matter which might have been specially pleaded. But this provision is manifestly confined to matters in bar. It would be absurd to suppose that the legislature meant to give to a mere

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exception in abatement the full effect of a perfect bar on the merits; which would be the case if such an exception would authorize a verdict for the tenant on issue joined on the mere right. The time and manner of filing the pleadings must, of course, be left to the established practice and rules in the Circuit Court.

As to the fourth point, we are of opinion that, under the act of Virginia of 1786, the tenant may, at his election, plead any special matter in bar, in a writ of right, or give it in evidence on the mise joined. The act is not deemed compulsive but cumulative.

The fifth question is that which has been deemed most important; and to this the counsel on each side have directed their efforts with great ability.

It is clear, by the whole amount of authority, that actual seizin, or seizin in deed, is, at the common law, necessary to maintain a writ of right. Nor is this peculiar to actions on the mere right. It equally applies to writs of entry; and the language of the count, in both cases, is, that the Demandant, or his ancestor, was, within the time of limitation, seized in his demesne as of fee, &c. taking the esplees, &c. It is highly probable that the foundation of this rule was laid in the earliest rudiments of titles at the common law. It is well known that, in ancient times, no deed or charter was necessary to convey a fee simple. The title, the full and perfect dominion, was conveyed by a mere livery of seizin in the presence of the vicinage. It was the notoriety of this ceremony, performed in the presence of his peers, that gave the tenant his feudal investiture of the inheritance. Deeds and charters of feoffment were of a later age; and were held not to convey the estate itself, but only to evidence the nature of the conveyance. The solemn act of livery of seizin was absolutely necessary to produce a perfect title, or as Fleta calls it, *juris et seisinæ conjunctio*. But, whatever may be its origin, the rule as to the actual seizin has long since become an inflexible doctrine of the common law.

It has been argued, that the act of Virginia, of 1786, ch. 27, meant in this respect to change the doctrine of the common law, because that act has given the form of

the count in a writ of right, and omits any allegation of seizin and taking esplees. There is certainly some countenance in the act for the argument. But, on mature consideration, we are of opinion that it cannot prevail. The form of joining the mise in a writ of right, is also given in the same act; and that form includes the same inquiry, viz: "which hath the greater right," as the forms at common law. It would seem to follow that the legislature did not mean to change the nature of the facts which were to be inquired into, but only to provide a more summary mode of proceeding. The clause in the same act allowing any special matter to be given in evidence on the mise joined, may also be called in aid of this construction. That clause certainly shews that it was not intended to relieve the Demandant from the effect of any existing bar; and want of seizin was, at the common law, a fatal bar. The statute of limitations of Virginia, of 19th December, 1792, ch. 77, which, as to this point, is a revival of the old statute, limits a writ of right upon ancestral seizin, to 50 years, and upon the Demandant's own seizin, to 30 years next before the teste of the writ. It is therefore incumbent on the Demandant to prove a seizin within the time of limitation; otherwise he is without remedy; and if so, it must be involved in the issue joined on the mere right. We are therefore of opinion, that the act of 1786 did not mean to change the nature of the inquiry as to the titles of the parties, but merely to remedy some of the inconveniences in the modes of proceeding.

If, then, an actual seizin or seizin in deed, be necessary to be proved, it becomes material to enquire what constitutes such a seizin. It has been supposed, in argument, that an actual entry under title, and perception of esplees were necessary to be proved in order to shew an actual seizin. But this is far from being true, even at the common law. There are cases in which there is a constructive seizin in deed, which is sufficient for all the purposes of action in legal intendment. In *Hargrave's* note, 3 *Co. Litt.* 24, *a*, it is said, that an entry is not always necessary to give a seizin in deed; for if the land be in lease for years, curtesy may be without entry or even receipt of rent. The same is the doctrine as to seizin in a case of *possessio fratris*. So if a grantee or heir of several parcels of land in the same county enter into one par-

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cel in the name of the whole, where there is no conflicting possession, the law adjudges him in the actual seizin of the whole. *Litt. s.* 417, 418.—In like manner, if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently, by such claim, a possession and seizin in the lands, as well as if he had entered in deed. *Litt. s.* 419. And living within the view of the land will, under circumstances, give the feoffee a seizin in deed as effectually as an actual entry. There are, therefore, cases in which the law gives the party a constructive seizin in deed. They are founded upon this plain reason, that either the claim is made sufficiently notorious by an actual entry into part, of which the vicinage can take notice, or the party has done all that, under the circumstances of the case, he was bound to do. *Lex non cogit seu ad vana aut impossibilia.* The same is the result of conveyances deriving their effect under the statute of uses; for there, without actual entry or livery of seizin, the bargainee has a complete seizin in deed. *Com. Dig. uses,* [*B.* 1.] [*I.*]—*Cro. Eliz.* 46.—1 *Cruise Dig.* 12.—*Shep. Touch.* 223, *&c. Harg. Co. Litt.* 271, *note.* And the Kentucky act respecting conveyances, which is, in substance, like the statute of uses, gives to private deeds the same legal effect.

It has, however, been supposed, in argument, that not only an actual seizin or complete investiture of the land, but also a perception of the profits, or, as it is technically called, a taking of the esplees, is absolutely necessary to support a writ of right. It cannot, however, be admitted that the taking of the esplees is a traverseable averment in the count. It is but evidence of the seizin; and the seizin in deed once established, either by a *pedis positio,* or by construction of law, the taking of the esplees is a necessary inference of law. If, therefore, a seizin be established, although the lands be leased for a term of years, and thereby the profits belong to the tenant, still the legal intendment is that the esplees follow the seizin. And so it would be although a mere trespasser, without claiming title, should actually take the profits during the time of the seizin alleged and proved. And, indeed, of certain real property, as a barren rock, a complete seizin may exist without the existence of esplees.

The result of this reasoning is, that wherever there exists the union of title and seizin in deed, either by actual entry and livery of seizin, or by intendment of law, as by conveyances under the statute of uses, or in the other instances which have been before stated, there the esplees are knit to the title, so as to enable the party to maintain a writ of right. And it will be found extremely difficult to maintain that a deed, which, by the *lex loci*, conveys a perfect title to waste and vacant lands, without further ceremony, will not yet enable the grantee to support that title by giving him the highest remedy applicable to it, without an actual entry.

Let us consider how far a perfect title to waste and vacant lands can be considered as having passed by a patent under the land law of Virginia of 1779, ch. 13. It is argued that such a patent conveys only a right or title of entry, which, until consummated by actual possession, gives the patentee no actual investiture or seizin of the land: and it is likened to the case of a patent from the crown. Some countenance is lent by authority to this position, so far as respects patents from the crown; but a careful examination will be found by no means to establish its correctness. No livery of seizin is necessary to perfect a title by letters patent. The grantee, in such case, takes by matter of record; and the law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage. The contrary is the fact, as to feoffments. The deed is inoperative without livery of seizin. This difference alone would seem to carry a pretty strong implication that actual seizin passed by operation of law, on a patent from the crown; for it is the union of a right and seizin that constitutes a perfect title; and when once the law has declared a title perfect, it must include every thing necessary to produce that effect. Accordingly we find it expressly held in *Barwick's* case, 5 Co. 94, that letters patent under the great seal do amount to a *livery in law*. What is a livery in law, but such an act as in legal contemplation, amounts to a delivery of seizin? If, for instance, a feoffment include divers parcels of land in the same county, livery of seizin of one parcel, in the name of the whole, is livery of all not in an adverse seizin. This, therefore, as to all the parcels except that whereof livery is actually made, is but a liv-

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cry in law; and yet to all intents and purposes it is as effectual as livery in deed. And it was upon the footing of this doctrine that, in *Barwick's* case, the court held that the conveyance of a freehold by letters patent to commence *in futuro*, was void as much as if the conveyance had been by feoffment; because in neither case could there be a present livery of the future freehold estate. The livery must operate at the time when it is made, or not at all. It is not therefore admitted by this Court, that letters patent of the crown do not convey a perfect title, where there is no interfering possession.

But even admitting it were otherwise, still we think a patent under the land law of Virginia must be considered as a statute grant, which is to have all the legal effects attached to it, which the legislature intended. It cannot be doubted that the legislature were competent to give their patentees a perfect title and possession without actual entry. Have they so done? We think that it is impossible, looking to the language of their acts, or the state of the country, to doubt that the whole legal estate and seizin of the commonwealth in the lands, passed to the patentee, upon the issuing of his patent, in as full an extent and beneficial a manner, (subject only to the rights of the commonwealth,) as the commonwealth itself held them. At the time of the passing of the act of 1779, Kentucky was a wilderness. It was the haunt of savages and beasts of prey. Actual entry or possession was impracticable; and, if practicable, it could answer no beneficial purpose. It could create no notoriety; it could be evidence to no vicinage of a change of the property. An entry therefore would have been a vain and useless and perilous act: and if there ever was a case in which the maxim would apply that the law does not oblige to vain or impossible things, we think it is such a one as the present. There is no pretence that the legislature have expressly made an entry a pre-requisite to the completion of the title. Such a pre-requisite, if it exist at all, must arise from mere implication only, and under circumstances which would render it nugatory or absurd. We do not, therefore, feel at liberty to insert in the operation of the grant a limitation which the law has not of itself interposed.

And this leads us to say, that even if, at common law, an actual *pedis positio*, followed up by an actual perception of the profits, were unnecessary to maintain a writ of right, which we do not admit, the doctrine would be inapplicable to the waste and vacant lands of our country. The common law itself in many cases dispenses with such a rule; and the reason of the rule itself ceases when applied to a mere wilderness. The object of the law in requiring actual seizin, was to evince notoriety of title to the neighborhood, and the consequent burthens of feudal duties. In the simplicity of ancient times there were no means of ascertaining titles but by the visible seizin; and, indeed, there was no other mode, between subjects, of passing title, but livery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seized, he had a perfect investiture; and, if ousted, could maintain his action in the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety, to prevent frauds upon the land and upon the other tenants. But in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry, a gathering of a twig or an acorn convey to civilized man at the distance of hundreds of miles? The reason of the rule could not apply to such a state of things; and *cessante ratione, cessat ipsa lex.* We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive seizin thereof, in deed, to the grantee, it attaches to him all the legal remedies incident to the estate. *A fortiori*, this principle applies to a patent; since, at the common law, it imports a livery in law. Upon any other construction, infinite mischiefs would result. Titles by descent and devise, and purchase, where the parties from whom the title was derived was never in actual seizin, would, upon principles of the common law, be utterly lost.

As to the sixth question. We are of opinion that in Kentucky, a patent is the completion of the legal title of the parties; and it is the legal title only that can come in controversy in a writ of right. The previous stages of title are merely equitable, which a Court of chancery may inforce, but a Court of common law will not entertain. In this opinion, we adopt the principles which the

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Courts of Kentucky have been understood uniformly to sanction. And this opinion is also an answer to the seventh question.

As to the eighth question. We are of opinion that a better subsisting adverse title in a third person, is no defence in a writ of right. That writ brings into controversy only the mere rights of the parties to the suit.

As to the ninth question. We have already expressed our opinion that tenants claiming different parcels of land by distinct titles cannot be joined in a writ of right. If, however, they omit to plead in abatement and join the mise, it is an admission that they are joint tenants of the whole; and the verdict, if for the Demandant for any parcel of the land, may be general, that he hath more mere right to hold the same than the tenants; and if of any parcel for the tenants, that they have more mere right to hold the same than the Demandant.

As to the tenth question. The general rule is, that if a man enter into lands, having title, his seizin is not bounded by his actual occupancy, but is held to be co-extensive with his title. But if a man enter without title, his seizin is confined to his possession by metes and bounds. In the case put by the Court below, the first patentee had the better legal title; and his seizin presently, by virtue of his patent, gave him the best mere right to the whole land, upon the principles which we have already stated. *A fortiori*, he must have the best mere right to the land not included in the actual close of the second patentee. For, by construction of law, he has the eldest seizin as well as the eldest patent.

As to the eleventh point. We are of opinion, that if a man having title to land enter into a part in the name of the whole, he is, upon common law principles, adjudged in seizin of the whole, notwithstanding an adverse seizin thereof. But if the land be in seizin of several tenants claiming different parcels thereof in severalty, an entry into the parcel held by one tenant will not give seizin to the parcels held by the other tenants; but there must be an entry into each. *Co. Litt. 252, b.* By parity of reason, an entry into a parcel which is vacant, will not give seizin of a parcel which is in an adverse seizin. But an entry into the last parcel, in the name of the whole, will enure as an en-

try into the vacant parcel. It does not appear, in the question put by the Court below, into which parcel the entry is supposed to be made.

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Such are the unanimous opinions of this Court, which are to be certified to the Circuit Court of Kentucky.

CARTER'S HEIRS v. CUTTING AND WIFE.

1814. Feb. 19th.

Absent....WASHINGTON, *J.*

THIS was an appeal from the Circuit Court for the district of Columbia.

An appeal lies to this Court from the sentence of the Circuit Court of the district of Columbia affirming sentence of the Orphan's Court of Alexandria county, which dismissed a petition to revoke the probate of a will.

E. I. LEE, *for the Appellants.*

TAYLOR, *for the Appellees.*

March 11th....STORY, *J.* delivered the opinion of the Court as follows:

The Appellants, who are heirs at law of Sally Carter deceased, petitioned the Orphan's Court of the county of Alexandria to revoke and repeal the probate of a will of the said Sally Carter procured by the respondents, upon the ground that the said will was admitted to probate without notice to the Appellants, and that the supposed testatrix was an inhabitant of and resident in Virginia at the time of her death, and left no assets real or personal or debts in the county of Alexandria. The Orphan's Court, without issuing a summons to the respondents, dismissed the petition, and upon an appeal this dismissal was confirmed by the Circuit Court of the district of Columbia.

Two objections have been taken to the sustaining of the appeal to this Court—1. That by the act of congress of *27th February*, 1801, *ch.* 86, *s.* 12, (*vol.* 5, *p.* 272) it is enacted that on appeals from the Orphan's

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Court to the Circuit Court, the latter "shall therein have all the powers of the chancellor" of the state of Maryland; and by the laws of Maryland the decree of the chancellor in a like case would be final. 2. That the decree of dismissal is not any final judgment, order, or decree of the Circuit Court wherein the matter in dispute, exclusive of costs, exceeds one hundred dollars.

The majority of the Court cannot yield assent to the validity of either of these objections. As to the first, we are of opinion that the conclusiveness of its sentence forms no part of the essence of the powers of the Court. Its powers to act are as ample, independent of their final quality, as with it. Besides the act of February 27, 1801, § 8. (vol. 5, p. 270) has expressly allowed an appeal from "*all* final judgments, orders and decrees of the Circuit Courts" where the matter in dispute exceeds the limited value, and there is nothing in the context to narrow the ordinary import of the language. We cannot admit that construction to be a sound one, which seeks by remote inferences to withdraw a case from the general provisions of a statute, which is clearly within its words and perfectly consistent with its intent. The case of *Young v. the Bank of Alexandria*, 4 *Cranch*, 384, is, in our judgment, decisive against this objection.

As to the second objection, it is conceded by both parties that the estate devised to the respondent, Sally C. Cutting, is worth several thousand dollars. If, then, the probate of the will had any legal operation and was not merely void, the controversy as to the validity of that probate was a matter in dispute equal to the value of the estate devised away from the heirs. It cannot be doubted that the Orphan's Court had jurisdiction to allow probate of wills made by persons in foreign states; and that probate, once allowed, operated as a sentence affirming the validity of such wills between the parties so far as the *lex loci* could give them operation. It is understood that a will regularly proved in another state in strict conformity with the laws of that state, acquires, if it possess the other legal requisites, a binding efficacy in Virginia, so that it may be admitted to record there. The estate devised is understood to be situated

in Virginia, and the title of the heirs thereto would consequently be affected by the probate in this district. The probate then not being merely void, but affecting the title to lands exceeding one hundred dollars in value is a matter in controversy beyond that value within the purview of the act of 1801.

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The decree of the Circuit Court dismissing the petition is reversed, and the cause is to be remanded to that Court with directions to proceed to a hearing upon the merits.

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APPEAL from the sentence of the Circuit Court for the district of Massachusetts.

If a citizen of the United States establishes his domicil in a foreign country between which and the United States hostilities afterwards break out, any property shipped by such citizen before knowledge of the war, and captured by an American cruizer after the declaration of war, must be condemned as lawful prize.

The following were the facts of the case, as stated by WASHINGTON, J. in delivering the opinion of the Court.

This is the case of a vessel which sailed from Great Britain, with a cargo belonging to the respective Claimants, as was contended, before the declaration of war by the United States against Great Britain was or could have been known by the shippers. She sailed from Liverpool on the 4th of July, 1812, under a British license, for the port of New York, and was captured on the 6th of August, 1812, by the American privateer Dolphin, and sent into the district of Massachusetts, where the vessel and cargo were libelled in the District Court.

Upon a shipment of goods to be sold, on joint account of the consignee & shipper, or of the latter alone at the option of the consignee, the right of property does not vest in the

The ship, 100 casks of white lead, 150 crates of earthen ware, 35 cases and 3 casks of copper, 9 pieces of cotton bagging, and a quantity of coal, were claimed by Lenox and Maitland.

198 packages of merchandize and 25 pieces of cotton bagging were claimed by Jonathan Amory, as the joint property of James Lenox, William Maitland and Alex-

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ander M'Gregor; not distinguishing the proportions of each: but the 25 pieces of cotton bagging were afterwards claimed for M'Gregor as his sole property, and also 5 trunks of merchandize.

consignee until he has made his election under the option given him. If two partners own jointly a commercial house in New York, & one of them obtains an American register for a ship by swearing that he, together with his partner, of the city of New York, merchant, are the only owners of the vessel for which the register is obtained, when in fact his partner is domiciled in England, the vessel is liable to forfeiture under the act of congress of December 31st, 1792. Laws U. S. vol. 2, p. 83.

21 trunks of merchandize were claimed by James Magee, of New York, as the joint property of himself and John S. Jones, residing in Great Britain.

The District Court, on the preparatory evidence, decreed restitution to Magee and Jones, and also to Lenox and Maitland, except as to the 100 casks of white lead; as to which, and as to the claim of M'Gregor, further proof was ordered.

From this decree, so far as it ordered restitution of the merchandize to Magee and Jones, and to Maitland, and of the ship to Lenox and Maitland, the captors appealed to the Circuit Court, where the decree was affirmed *pro forma*, and an appeal was taken to this Court.

In April, 1813, the cause was heard on further proof in the District Court; and in August the claim of M'Gregor was rejected, as well as that of Lenox and Maitland to the white lead. But at another day, on a further hearing, the Court ordered restitution to M'Gregor of one fourth of the property claimed by him, and condemned the other three fourths as belonging to his partners, being British subjects. Both parties appealed, as did also Lenox and Maitland in relation to the white lead. A *pro forma* decree of affirmance was made, from which an appeal was taken to this Court.

Maitland, M'Gregor and Jones were native British subjects, who came to the United States many years prior to the present war, and, after the regular period of residence, were admitted to the rights of naturalization. Some time after this, but long prior to the declaration of war, they returned to Great Britain, settled themselves there, and engaged in the trade of that country, where they were found carrying on their commercial business at the time these shipments were made, and at the time of the capture. Maitland is yet

in Great Britain, but has, since he heard of the capture, expressed his anxiety to return to the United States; but has been prevented from doing so by various causes set forth in his affidavit. M'Gregor actually returned to the United States some time in May last—Jones is still in England.

PITMAN, *for the captors.*

In relation to the several claims set up in this case, it will be contended, on the part of the captors, 1st. That they are to be determined, as it respects the capacity to claim, by the national character of the Claimants at the time of the capture. If the Claimants, *at the the time of capture,* were British subjects the property is undoubtedly liable to condemnation.

It is admitted, on all hands, that the Claimants, Maitland, M'Gregor and Jones, had acquired a domicil in Great Britain at the time of the declaration of war; and were actually domiciled in that country at the time of the capture: they must, therefore, be considered as British subjects, in reference to the property claimed by them respectively. Nor will an intention to return to the United States, if that intention be not manifested until *after the capture,* be of any avail, for it is a principle in prize law, that the national character of property, during war, cannot be altered, *in transitu,* by any act of the party subsequent to the capture.

The following cases are considered as going to establish the foregoing positions: 1 *Rob.* 97, 115. *The Herstelder.* *id.* 90, 107. *The Danchebaar Africaan.* 5 *Rob.* 257. *The Boedes Lust* 3 *Rob.* 17, 12. *The Indian Chief.* 1 *Rob.* 12, 14. *Cases cited by sir W. Scott in the Vigilantia.* 2 *Dallas,* 42. *Sloop Chester v. Brig Experiment.* 3 *Rob.* 29. *The Indian Chief. Livingston and al. v. the Maryland Ins. Co. decided in the Supreme Court of the United States at the last term.* 3 *Bos. and Pul.* 207. *Case of the Franklin cited in note.* 3 *Rob.* 37, 38. *The Citto,* 5 *Rob* 60. *The Diana,* 2 *Rob.* 263, 323. *The Harmony.* 5 *Rob.* 270. *The Jonge Classina.*

It appears that Maitland has, since he heard of the capture, expressed his anxiety to return to the United

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States; and that M'Gregor did actually return. But we contend, upon the principle above stated, that neither the intention of Maitland, although formerly naturalized in this country, nor the actual return of M'Gregor, inasmuch as they did not take place till *after the capture*, can avail for the purposes of their respective claims.

And even if it should be proved that Maitland's intention to return existed previous to the capture, it would not avail him, if nothing more than intention could be proved. The case of the *President*, 5 *Rob.* 277, is in point: it is there decided that an *intention* to return is of no avail, unless that intention be evidenced by some overt-act. Here no such overt-act, on the part of Maitland, is proved. The following cases go to establish the same point: 3 *Rob.* 37, 38. *The Citto. Curtisos' case cited in* 5 *Rob.* 65. *The Diana, and in* 3 *Rob.* 17, 12. *The Indian Chief.* As to M'Gregor, vid. 3 *Rob.* 264, 322. *The Harmony.*

M'Gregor's return to America, after capture of the vessel, will not avail him unless he can prove,

1st. That he had, previous to the capture, set himself in motion to return.

2d. That he had done so with a *bona fide* intention of remaining in America.

3d. That he had no intention of returning to England.

Vid. the case of the *Indian Chief*, 3 *Rob.* 17, 12.

But the national character of these parties, Maitland, M'Gregor and Jones, does not depend upon domicil. They were originally native subjects of Great Britain; and, after being naturalized in this country, they returned to England, and resumed their native allegiance, in violation of their oath of naturalization. By this conduct we contend that they lost the character of American citizens, and could not, *flagrante bello*, resume it for the mere purpose of protecting their property. In a Court of the law of nations, as well as by the navigation laws of the United States, they cannot but be con-

sidered as British subjects. In the case of *La Virginie*, 5 *Rob.* 98, *sir W. Scott* said, "It is always to be remembered, that the native character easily reverts, and that it requires fewer circumstances to constitute domicil in the case of a native subject, than to impress the national character on one who is originally of another country."

It is not necessary to contend against the doctrine of expatriation. We do not deny the right. We contend only that in order to render his naturalization valid for the purposes in question, a man must expatriate himself *bona fide*, must remove from his original country and not return to it, *animo manendi*. In support of this doctrine, *vid. the act of congress of March* 27, 1804. *Laws of U. S. vol.* 7, *p.* 146—also *act of* 31*st December*, 1792, § 2. *Laws U. S. vol.* 2, *p.* 132. 3 *Dallas*, 153, *Talbot v. Janson.*

The British doctrine on this subject is well known: "*Once a British subject, always a British subject*," is an established rule in the English law. Great Britain respects the naturalization laws of the United States only for commercial purposes. If one of her subjects be naturalized in this country, and afterwards return to a British territory, she considers him as still, *to all intents and purposes*, a British subject. She does not even require him to abjure his adopted allegiance.

It is to be presumed that Maitland, M'Gregor and Jones knew the laws of their own country: yet with this knowledge they returned to England; and that, as it appears from their subsequent conduct, not for a temporary purpose merely, but *animo manendi*. They have established there a house of trade. They have placed themselves and their property under the protection of Great Britain, and cannot now, with any show of reason, claim protection from the United States, although the United States may still claim something from them. 2 *Cranch*, 120, *Murray v. Schooner Charming Betsy.*

It is evident, from all the circumstances of the present case, that Maitland did not intend to return to the United States until he heard of the capture of the ves-

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sel: on the contrary, it appears that, with a full knowledge of the war, he made his election to remain in England.

When M'Gregor left England for the United States, he embarked as a British subject. His passport was from the privy council, and signed by lord Sidmouth; whereas American citizens obtained their passports from the alien office. He is still a partner in a house of trade in England—he is engaged in a *British* trade. It remains for these parties to explain their conduct. We have stated the facts, and the burden of proof now lies on the Claimants. Such would be the rule even if they were neutrals. 3 *Rob.* 37, 38. *The Citto.* 4 *Rob.* 201, 232. *The Dree Gebroeders.* 1 *Rob.* 88, 104. *The Bernon.* 1 *Rob.* 12, 15. *The Vigilantia.* 3 *Rob.* 40, 41. *The Portland.* 5 *Rob.* 91. *The Ocean.* 2 *Rob.* 264, 322. *The Harmony.*

In attempting to establish the national character of these Claimants, as American citizens, it was said in the Court below, that they held landed property in this country. This argument is overthrown by the decision in the case of the *Dree Gebroeders* cited above; 4 *Rob.* 194, 235.

2. It appears that M'Gregor has fraudulently attempted to cover the whole property in question; his claim, therefore, being false in part, he cannot recover even his own share, although we should admit him to be an American citizen. The whole, therefore, is justly liable to condemnation. 2 *Rob.* 212, 257. *The Susa.* 1 *Rob.* 210, 250. *The Odin.* 2 *Rob.* 281, 343. *The Rosalie and Betty.* 3 *Rob.* 92, 109. *The Graaf Bernstorf.* 4 *Rob.* 65, 73. *The Jonge Pieter.*

3. As to the claim of Lenox and Maitland to the ship, we contend, 1st. That, under the act of congress of March 27, 1804, (*Laws U. S. vol.* 7, *p.* 146) she cannot be considered as an American vessel. By that act it is declared "That no ship or vessel shall be entitled to be registered as a ship or vessel of the United States, or, if registered, to the benefits thereof, if owned in whole or in part by any person naturalized in the United States, and residing for more than one year in

the country from which he originated. &c. But Maitland had been residing in England more than a year, and consequently was not entitled to an American register. 2d. That Lenox being found in violation of the law, as it respected the ship's register, he is not *rectus in curia* for the purpose of claiming the ship. Vid. the cases cited in the *Rapid*, on this point. viz. 2 *Rob.* 72, 77. *The Walsingham Packet.* 5 *Rob.* 28, 32. *The Cornelis and Maria.* 6 *Rob.* 348. *The Recovery.* 3d. That Lenox and Maitland having attempted to conceal enemy's property, (the 100 casks of white lead) and to withdraw the same from the belligerent rights of the United States by a fraudulent shipment and claim, their claims to the property captured therewith must be rejected, and the penalty of confiscation attaches to the same. This principle is intended to be applied to the claim of Maitland as well to the cargo as to the ship.

There can be no reasonable doubt that the lead belonged to some person or persons other than the Claimants. The following facts are considered as conclusive on this point.

1. The original bill of parcels enclosed in a letter dated 3d July, 1812, from Wm. Maitland & Co to Lenox and Maitland, is headed thus: "Thomas Holloway bought of Thomas Walker, Malby & Co. lead merchants," and is dated at Liverpool, June 2d. 1812.

2. In the bill of lading of the goods claimed as the property of Lenox and Maitland, in which the white lead is included, the *freight* and *primage* is cast upon the lead in the margin of the bill of lading, and not upon the crates, copper, bagging, or coal.

3. To a letter from Maitland to Lenox of 22d August, 1812, found on board the Lady Gallatin, is annexed a list of goods shipped by Wm. Maitland & Co. by the Venus, on account of and consigned to Messrs. J. Lenox and Wm. Maitland. In this list all the goods claimed by Lenox and Maitland, and by Lenox, Maitland and M'Gregor, are enumerated, *except the white lead.*

4. Upon the order for further proof in the District

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Court, no further proof was offered respecting the lead. Maitland, in his affidavit made January 7th, 1813, in Liverpool, swears that the copper, crates, coals and bagging were purchased and shipped on board the Venus, on the sole account and risk of himself and Lenox: he also swears as to their joint property with M'Gregor: *but says not a word about the lead.*

From these circumstances we must conclude that the white lead was the property of Thomas Holloway, an acknowledged British subject; that it is therefore liable to condemnation, and subjects the property captured with it to the same fate.

4. In respect to the claim of Magee and Jones, we contend that at the time of capture the property belonged solely to Jones, a British merchant and subject, and is therefore to be condemned as enemy property.

In the bill of lading of these goods, they are expressed to be shipped by M'Gregor & Co. unto and on account of James Magee & Co. of New York. The invoice is signed by Jones, at Manchester, and describes them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co. of New York; but does not specify on whose account and risk. It is therefore to be considered as at the risk of Jones. Vid. on this point, the case of the *Marianna*, 6 *Rob.* 27.

In a letter from John S. Jones to James Magee & Co. dated at Manchester, 1st July, 1812, he says, "This serves to hand you invoice of 21 trunks prints per Venus, amount 1,323*l.* 13*s.* 0*d.* subject to the same terms as the goods per Aristomenes; that is, to be sold on joint account, *or an mine at your option.*" Now, to effect a change of property, it is essential that there be a contract of sale agreed to by both parties. Here appears to have been no such contract. The property, therefore, at the time of capture, was exclusively in Jones.

If Jones had a right to stop these goods *in transitu*, so had the United States, who, by the laws of war, succeeded to his rights. 6 *Rob.* 127. *The Constantia. The Copenhagen*, 1 *Rob.* 245, 291, is an analogous case.

STOCKTON, *contra*, for *M'Gregor*, contended,

1st. That M'Gregor, to the exclusion of his partners, Lenox and Maitland, was owner of *one half* of 198 packages of Manchester goods, and one half of 25 pieces of cotton bagging, and to *the whole* of five trunks of goods.

2d. That these goods were not the goods of an enemy, and ought to be restored to M'Gregor as an American citizen.

In support of the first point, he relied on the ship's papers, on certain letters of Maitland & Co. and of M'Gregor himself, on the affidavits of M'Gregor in the Court below, &c. He contended that the testimony on this point, introduced since the evidence *in præparatorio*, was incompetent; but if competent, not important. The cause was heard in September, 1812, and further proof allowed for the Claimants; but no such order on the part of the captors, nor any order to proceed by *plea and proof*. The cause stood, on their side, on the proof taken *in præparatorio*. The evidence introduced by them is upon simple affidavit. 1 *Rob.* 263, 313. *The Adriana. Letter from sir W. Scott and sir J. Nicholl to Mr. Jay*, 1 *Rob. (Amer. ed.) p.* 8.

Second point. As to the national character of M'Gregor. He came to the United States a minor; was an established merchant in New York before 1795; he was then naturalized; he married in New York, and purchased a house there before his departure for England, which he still retains: he has also purchased large tracts of land in the states of New York and New Jersey, which he yet owns: he resided about twelve years in New York. His return to England was produced by temporary causes. In 1798 he returned thither on account of the sickness of his wife, who died in Scotland. His second return was for his own health. In 1805 he commenced business in Liverpool as an American merchant. His employment was that of an American merchant shipping goods from England, and receiving American produce to sell there on commission. His *residence* in England was in *time of peace:* it was lawful, and could in no manner impair his rights as a

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citizen of the United States. He had no intention to abandon his American rights, or to remain permanently in England; but intended to return to the United States whenever his duty should require him to return. Such a residence, *in time of peace*, could not stamp a hostile character upon him; and, at the breaking out of war, he was entitled to a reasonable time to depart from the British dominions, before he could forfeit his American character and become identified with the enemy. He did depart therefrom, and returned to the United States with his family within a year after the declaration of war. His having formed a connexion in trade with British partners was a lawful act, which did not derogate from his American character, but extended and facilitated his business as an American merchant.

Congress did not mean to authorize the capture of property belonging to mere *inhabitants* of the hostile country. When the bill to authorize the president to issue letters of marque was brought into the senate of the United States in June, 1812, it authorized him to issue them against all persons *inhabiting* in Great Britain or its territories or possessions; but was amended in the senate so as to authorize him to issue them only against the united kingdom of Great Britain and Ireland and the *subjects* thereof. *See the secret journal of the senate for June*, 1812.

Many cases have been cited by the counsel for the captors in his endeavor to prove this a case for condemnation. The answer to most of them is, that the controversy in those cases was between neutrals and belligerents; not between Great Britain and her subjects. The two cases are entirely different in principle. The connexion between a citizen and his government depends on the municipal law of the land. The rights of a neutral depend upon the law of nations.

With regard to the doctrine of naturalization, it is well known that, by the law of England, a person naturalized by act of parliament is as much a subject, to all intents and purposes, as a native. *Co. Lit.* 129, *a. Bl. Com. B.* 1, *c.* 10, *p.* 374. M'Gregor, we have seen, was naturalized in the United States. But it is said that he has returned to his former allegiance, and there-

by lost his American character. This we deny. He returned to England in time of peace, by which we contend he neither forfeited nor abandoned his character as an American citizen. Our act of naturalization contains nothing to authorize the opinion that he did. Nor could he throw off his adopted allegiance if he would. If found in arms against us he would be punished as a traitor.

The act of March, 1804, which has been cited by the captors, merely declares that a naturalized citizen shall lose one particular privilege of his citizenship by residing for more than a year in the country from which he originated; from which the implication is clear, that he shall retain all his other privileges.

In the case of the *Charming Betsy*, 2 *Cranch*, 64, and in the case of *M'Ilvaine v. Coxe's lessee*, *decided in* 4 *Cranch*, 211, the decision of this Court was, that residence in a foreign country does not deprive an American citizen of his rights as such. It has been decided, also, that by such residence in time of peace, the national character is not changed upon the sudden breaking out of a war. Residence in time of peace is lawful; and if the person so residing return to his own country in a reasonable time after the breaking out of the war, he does not lose his original national character. 1 *Bos. and Pul.* 442, *Marryat v. Wilson*. *Vattel*, *B.* 1, *c.* 19, § 218, *p.* 169. *Sir W. Scott* has never said that such a residence would, on the sudden breaking out of a war, give a hostile character to the resident: he has never gone so far as to condemn property situated like that now in question. 5 *Rob.* 90. *The Ocean.*

Vattel (*B.* 3, *c.* 4, § 63, *p.* 477) says, that the sovereign declaring war is to allow those subjects of the enemy who are within his dominions at the time of the declaration, a reasonable time for withdrawing with their effects: and certainly a nation ought not to grant less indulgence to its own citizens than the enemy allows them. I trust this Court is not yet prepared to adopt, even with respect to neutrals, much less with regard to American citizens, the rigid rules of the British Court of admiralty—a mere political Court—a prerogative Court regulated by the king's orders in council,

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designed to give Great Britain the sovereignty of the ocean, to subject the whole commerce of the world to her grasp, and to make the law of nations just what her policy would wish it to be.

It is doubtful whether the Court ought to condemn, under the circumstances of the present case, although it should be proved that the property in question was enemy property.

The shipment, in the present case, was made on the faith of the representations of the American charge d'affaires, Mr. Russell; who had given it as his opinion that property shipped after the repeal of the British orders in council, and before knowledge of the war, would be admitted into the United States. Under these circumstances the conduct of the owners of this property was perfectly justifiable. It has been decided in a British Court, that property which comes into the possession of a nation under the public faith, is not liable to forfeiture, and Congress has virtually acknowledged the same principle, by passing the act of *27th February*, 1813, remitting the forfeitures which had accrued under the non-intercourse act of March 1, 1809. *Laws U. S. vol. 11, p. 388. Vid. Mr. Russell's statement in the report of the committee of congress... journal of H. of Rep.* and the *case of the Althea, cartel*, which was captured at Halifax as American property, and discharged by *judge Croke, because it came into the possession of the British under the public faith.*

PITMAN, as to the objection to the invocation of papers from other Courts, cited the following authorities: *14th Interrogate*, 1 *Rob. (Amer. ed.)* 323. 6 *Rob.* 351. *The Romeo.* 4 *Rob.* 170, 205. *The Convenientia.* 1 *Rob.* 27, 31. *The Magnus.* 2 *Rob.* 2, 3. *The Eenrom. id.* 211, 254. *The Susa. id.* 281, 343. *The Rosalie and Betty.* He observed that there was an order, in the Circuit Court, for further proof on the part of the captors, saving the question whether it were a case for further proof.

HARPER, for *Lenox* and *Maitland* and *Jones* and *Magee.*

Lenox and Maitland claim.

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1st, The ship Venus.

2d. As their joint property, the white lead, crates, copper, cotton bagging and coal.

3d. One moiety of 198 packages of merchandize and cotton bagging, as the joint property of Lenox and Maitland and Alexander M'Gregor, and shipped by them.

Magee and Jones claim 21 trunks of prints, part of the cargo of the Venus, as their joint property.

Lenox and Maitland are natives of Scotland. They removed many years since to New York, where the former was naturalized on the 10th of November, 1794, and the latter on the 8th of July, 1804. They entered into partnership in trade in 1797, and established their house in New York, in which they were alone interested, under the name and firm of J. Lenox and W. Maitland; which has continued to the present time. For fourteen years they both resided, without interruption, in the city of New York, carrying on the business of their American house, as American citizens; and, as such, they hold valuable real estate in the city and in the state of New York, and also hold American registered ships. Lenox still resides in New York; but Maitland, in July 1810, to promote the interest of their commercial establishment in New York, by attending the sales of the shipments to Europe and the returns to America, went to Liverpool, in England, where, in 1811, he took a house and counting-room and transacted business for the said concern, under the name and firm of W. Maitland and Co. consisting only of said Lenox and Maitland. He has long since given up his counting-room and attempted to dispose of his house; and is still in England, detained there by sickness. In July, 1812, and long before and at the time of the capture of the Venus by the Dolphin, Lenox and Maitland were the sole owners of the said ship under an American register. The Venus sailed from Liverpool for New York, on the 4th of July, 1812, with a cargo of British produce and manufactures, the proceeds of the funds of Lenox and Maitland, with instructions to wait off the Hook, to know if the goods could be landed. Proceed-

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ing with her cargo on this voyage, she was captured and libelled as has been before stated.

James Magee was naturalized 9th August, 1803, and has ever since resided and been established in New York.

John S. Jones was naturalized 10th December, 1795, and resided in New York thirteen years. In 1810, he went to Manchester (England.) and arrangements were made for shipping goods to Magee, the partner in New York.

It has been contended, on the part of the captors, with regard to the ship, that, by the laws of the United States, she is not to be deemed an American ship, nor entitled to the benefits of an American register, on account of the residence of Maitland in Liverpool for more than a year.

Admitting, for the sake of argument, that this position is correct, still we contend that the ship is not forfeited. She has merely incurred the disability attached to a foreign ship. Her owners are still American citizens, but have lost the privilege of availing themselves of the register. It is contended, however, that this very disability which attaches to the ship, renders her belligerent property. This is truly a novel doctrine. There is no law by which it can be supported.

As to the right of Lenox to his share of the ship, there can be no reasonable doubt. He is certainly an American citizen and has done nothing to forfeit that character. He has been naturalized in this country, and has continued to reside here ever since. It is said, however, that he has made a false claim to the white lead. This point will be considered in the course of the argument.

Maitland, it is true, has been residing in England for a considerable time past: and it is upon this ground that the ship and cargo is claimed by the captors. They contend that his residence in England (although an American citizen) clothes him with a hostile character.

To this it may be answered, that the residence which imparts a hostile character must be residence connected with some act of commerce blended with the commercial transactions of the enemy. Mere residence does not give a hostile character, so long as the resident refrains from all voluntary acts tending to the aid and comfort of the enemy. If he engages in the enemy's commerce, he must, to be sure, be considered as an enemy; but even then, only to the extent of the commercial property engaged in the hostile trade, which may chance to be captured. A man in an enemy's country may send home books or furniture purchased before the war for his own use, and they will not be hostile property. There must be a *trading* with the enemy to constitute an offence. Trading is *essential*; *time* is not. A mere continuation in an enemy's country after the commencement of hostilities, without any act of trade, has never been decided to constitute a man an enemy. *Sir W. Scott* himself allows a person found in the enemy's country, a reasonable time to withdraw his effects, and even to *trade* with the enemy so far as it may be necessary for the removal of his property. 3, *Rob.* 17, 12. *The Indian Chief.* 4, *Rob.* 161, 195, *Madonna delle Gracie.* 1, *Rob.* 165, 196, *the Hoop.*

But it is said, that though an illegal act should be proved to have been committed by Maitland, yet that Lenox has been guilty of making a false claim to part of the cargo, which act of Lenox has criminally affected the property of Maitland.

We answer, that the doctrine on the subject of covering enemy property, applies only to neutrals; but Lenox was a citizen of the United States. Besides, it does not by any means appear, that, in making this claim, Lenox was influenced by a fraudulent motive. His conduct was, in all probability, owing to mistake. He had not seen the letters and papers proving the property, claimed by him, to belong to the enemy; and therefore cannot be supposed to have known that fact.

It is further urged by the captors, that a letter by the Lady Gallatin, of 22d August, 1812, shows that a purchase of 100 bags of cotton was made by Maitland, after knowledge of the war.

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To the admissibility of the invoked papers, among which this letter is one, we have already objected, and must still insist upon the objection. Setting aside those papers, it does not appear that Maitland did purchase the cotton after knowledge of the war: and the presumption ought to be in his favor. But suppose this single purchase was made one day after war was known to exist, (which is all the captors contended for) is this sufficient to fix a hostile character, especially under circumstances like those attending this transaction, when it was universally supposed that the repeal of the orders in council would have put an end to the war?

With regard to Jones, it has only been proved that he was residing in England a few months after the commencement of hostilities; but there is no evidence that he has not returned; nor is there any evidence of his having traded with the enemy. The burthen of proof lies on the captors.

DEXTER, *in reply.*

In cases like that now before the Court, the advantage in obtaining evidence is clearly on the side of the Claimants. They have in their power the knowledge of all the facts relative to the case. The evidence *in præparatorio* consists of the documents on board the ship, and the testimony of the crew. They may make out their own case. If the evidence in their favor be deficient, they may have an order for further proof, which does not give the captors any opportunity of introducing further evidence on their part. Under circumstances so manifestly advantageous, if the Claimants do not fully prove their case, the presumption must be against them. Whether the Claimants in the present case have satisfactorily done so, it is for the Court to decide.

With regard to the question of domicil. *Sir W. Scott* has decided that the *animus manendi* is to be presumed under circumstances perfectly analogous to those of the present case. What are the facts with regard to the several parties whose claims are now disputed? M'Gregor, it appears, is a native of Scotland: he became a citizen of the United States by naturalization, in 1795, and resided at New York until 1802, except a temporary

visit to his native country, for the health of his wife. In 1802. he left New York for his own health, and in 1804, established himself in a house of trade in Liverpool (England) in connexion with James Dennistown, a British subject. Two other partners were afterwards admitted, both British subjects. M'Gregor was the only one of the partners who resided in Liverpool, and was the acting partner of the concern. He married a second wife in Great Britain, and had several children there, during his residence in Liverpool.

These facts are abundantly sufficient to establish his domicil.

The question, then, remains—did he take timely and sufficient steps, after knowledge of the war, to divest himself of his British character, and return to the United States? This does not appear. On the contrary, it appears from papers invoked and introduced into this cause, and it is not contradicted, that he continued his connexion with his British partners ten months after the declaration of war, and, as acting partner of the house, made a shipment to Halifax. He has not, in any of his affidavits, declared that he did not continue his trade. The testimony on his part does not deny all secret trusts. He comes into Court well informed of the suit, yet without the books, articles of partnership, original bills of parcels, and the other papers connected with the transactions under consideration.

It has been urged in his defence, that being a commission merchant, having the property of others in his hands, and being the only acting partner of the firm, he was justified in remaining in England till he could wind up his business. But this is no sufficient justification. The contracts of a citizen residing abroad, must be consistent with the interests of his country. If the good of his country requires his return, as in the event of war, it is his duty to leave his business in other hands. M'Gregor might have left his affairs to the care of his partners.

Most of the facts with regard to Maitland have been already stated. It may be added, however, that he continued to reside in England and was transacting busi-

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ness there as late as April, 1813; whereas the war was known on the 24th or 26th of July, 1812. In his letter of the 22d of August, 1812, in which he informs his partner of a purchase of cotton wool he had just made, he says nothing of any intention of returning to the United States.

His continuance in England is defended on nearly the same grounds as that of M'Gregor; viz. his extensive mercantile concerns. Sickness was not alleged by him as an excuse, till 13th April, 1813.

As to the goods shipped by Jones, it has already been observed, that, in his letter to Magee of 1st of July, 1812, he gives him his option either to be interested in them or not. Of course, at the time of the shipment, they were the sole property of Jones; and before the letter was receceived by Magee—before there was a possibility of his making an election, the goods were captured; but it is an acknowledged rule of prize law, that the character of goods cannot change *in transitu*; at the time of capture, therefore, they were the sole property of Jones, and must, we contend, be condemned *in toto*.

Besides the particular circumstances which have been urged in justification of the individuals concerned in this cause, a general defence has been set up; viz. That though the property in question should be determined to be British, yet it came here under the faith of the nation; and is therefore entitled to protection. *Vattel*, it is said, lays down this doctrine. This is not denied. But did the property in controversy come into the country under the national faith? It was not here at the breaking out of hostilities. It was not brought into the country until after the declaration of war; and then it was brought in as a prize of war. Besides, if it was considered as protected on this principle, why was the attempt made to cover it under the name of M'Gregor? This has a suspicious appearance; and shows clearly that the Claimants themselves placed little reliance on the circumstance which is now urged in their defence.

As to the objection to the admission of the invoked papers, it need only be observed that the counsel for the

Claimants is under a mistake on the subject. There was an order for further proof on the part of the captors; and under that order these papers were invoked.

The great question of law on the subject of domicil yet remains to be examined.

Three classes of residents are recognized by the law of nations.

1st. Mere residents.

2d. Domiciled residents.

3d. Natural born subjects.

Before entering upon the discussion of the main question, I would remark, with regard to some observations which have fallen from the counsel for the Claimants respecting the severity of the rules adopted by the British Court of admiralty, that these rules have been applied by *sir W. Scott* with equal rigor, to British subjects as to neutrals; which is a sufficient answer to the allegation that they have been introduced merely to subserve the grasping policy of the British nation, and destroy all neutral commerce.

With regard, then, to the first class of residents. It is admitted that mere residence in a foreign country, for a particular temporary purpose, without engaging in the commerce of the country, is not sufficient to change the national character.

2d. Residence in a foreign country connected with the carrying on a general trade and mixing in the commercial affairs of the nation, constitutes *domicil*; thereby making a man, *sub modo*, a subject of that foreign country: and in case of war breaking out between his original and adopted country, if he continues, notwithstanding, to reside and trade in the latter, he is to be considered by his original country, as invested with a hostile character to all intents and purposes. He ought not, it will be admitted, to be considered in this light immediately on the declaration of war: he ought, perhaps to be allowed a reasonable time to make his election whether to remain

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where he is or return to his own country. Respectable authorities, however, have said that, if required, he is bound to return. *Sir W. Scott* says he is bound immediately to put himself in motion to return.

3d. As to *mere* native subjects, it is needless to make any remarks. The persons whose national character is now in question are natural born subjects of Great Britain, naturalized in the United States, and who afterwards returned to the country of their nativity. These persons, we contend, are, even without the intervention of a war, as much British subjects as if they had never been naturalized in another country. The British government had a right to prevent their return to the United States. In saying this, we would not be understood as admitting the legality of impressment; the cases are materially different.

The naturalization law of the United States requires permanent *residence*: and no longer than that residence continues, can a man claim the privileges of naturalization. Before he can be admitted to those privileges, he must abjure all allegiance to the state of which he was before a citizen. By so doing, he binds himself not to return to that state. By returning he violates his oath; and can thereafter claim no protection from the country which he has thus abandoned. Abjuration does not absolve him from his former allegiance; he may incur new duties, but he cannot swear away his old obligations. It is for this Court to explain the true meaning of the law of naturalization. It may, however, be observed, that neither the constitution nor the laws of the United States consider a naturalized citizen in the same light as a native. The laws of Great Britain, also, and indeed the laws of every country, make a distinction between the two. A native is considered as a citizen wherever he goes; but a person naturalized is no longer looked upon as a citizen, than while he continues in his adopted country. No nation confers the privilege of naturalization without an equivalent. No nation extends its protection to naturalized subjects, if they return to their former country. And shall we be an exception? Shall we be the first to extend to naturalized foreigners this Quixotic protection?

The expression "*ad fidem utriusque regis*," from *Calvin's case*, has been mis-translated, "the faith of *both* kings." Had that been the meaning of the phrase it would have been *utrumque regum*, in the plural: The meaning is, that a man may be the subject of either power according to his residence. Were the doctrine, that he may be the subject of both, correct, he would have it in his power to enjoy the privileges of both governments, without being subject to the duties of either.

With regard to the false claim of Lenox. It is a rule of prize law, that a man who makes a false claim to protect enemy property, forfeits any property of his own that may be captured with it. This Lenox appears to have done with respect to the white lead. If he has, not only his own property is forfeited, but that of Maitland his partner must share the same fate. What has been said by the counsel for the Claimants to exculpate Lenox, is mere conjecture.

As to the ship. It is clear that the register was improperly obtained—not to say *fraudulently*. Maitland, by residing in England, was not entitled to an American register. Lenox, by concealing, when on oath, the fact of Maitland's residence in England, becomes *particeps criminis*, and if the mixes his interest with that of his partner, the same decree must be rendered as to the property of both.

STOCKTON, with regard to the withholding of papers with which M'Gregor was taxed by the counsel on the opposite side, stated that the decree of the Court below was only rendered in October last, when M'Gregor had the first intimation that the papers were required; since which, there had not been time to obtain them.

Saturday, March 12th. Absent....LIVINGSTON. *J.*

WASHINGTON, *J.* after stating the facts of the case, delivered the opinion of the majority of the Court as follows:

The claims of Maitland, M'Gregor and Jones are resisted, *in toto*, upon an objection to the national character of the Claimants. The general question affecting

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these parties, will, for the present, be postponed in order to dispose of particular objections which are made to all the claims, either in whole or in part, and which will depend on the particular circumstances applying to those cases.

1. The first claim that will be considered will be that of Lenox and Maitland to the 100 casks of white lead, which it is contended, is the property of Thos. Holloway, an acknowledged British subject, but shipped in June, 1812, by Wm. Maitland & Co. (a house established in Liverpool, and composed of Wm. Maitland and James Lenox) to Lenox and Maitland, a house established at New York, and composed of the same parties. To establish the fact of property in Thos. Holloway, the captor relies upon the following evidence: The original bill of parcels, enclosed in a letter under date of the 3d of July, 1812, from Wm. Maitland & Co. to Lenox and Maitland, which is headed thus, "Thos. Holloway bought of Thomas Walker & Co. lead merchants," dated June 2d, 1812. In corroboration of this *prima facie* evidence of property in Holloway, the freight and primage of this lead is cast in the margin of the bill of lading, but not so upon the acknowledged property of Lenox and Maitland, the owners of the ship, and included in the same bill of lading; from which circumstance it is argued that this article did not belong to Lenox and Maitland; since, if it did, no freight could have been charged on it, any more than upon the other parts of the cargo claimed by them. In addition to this, in a list of goods shipped by Wm. Maitland & Co. by this vessl, on account of and consigned to Lenox and Maitland, and enclosed in a letter of the 22d August, 1812, from the former to the latter, by the Lady Gallatin, all the goods claimed by that house separately, and also by them and M'Gregor jointly, are enumerated, except this parcel of white lead. This evidence is certainly very strong to fix a hostile character on this property; and is rendered conclusive by the omission of Maitland, in his affidavit made under the order for further proof, to say any thing in relation to the white lead, although he is very particular as to all the other property claimed by Lenox and Maitland, and by that house jointly with M'Gregor. This Court is

therefore of opinion that the Court below did right in rejecting this claim.

2. The next claim to be considered, is that of Magee and Jones to a part of the cargo on board of this vessel. Magee is a citizen of the United States, settled in New York, and connected with Jones in a house of trade. It is urged by the captors that the whole of this property ought to have been condemned as the sole property of Jones. The bill of lading of these goods expresses them to be shipped by M'Gregor & Co. unto and on account of James Magee & Co. of New York. The invoice is signed by Jones, at Manchester, in England, and describes them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co. of New York; but it does not specify on whose account and risk. In a letter from Jones to Magee, dated the 1st of July, 1812, covering an invoice of these goods, he says "they are to be sold on joint account, or on mine at your option." The whole question, as to the exclusive property of Jones in these goods, is rested, by the captors, upon the above expressions giving an option to Magee to be jointly concerned or not in the shipment. The question of law is, in whom the right of property was at the time of capture? To effect a change of property as between seller and buyer, it is essential that there should be a contract of sale agreed to by both parties, and if the thing agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract that it should be delivered to the purchaser or to his agent, which the master, to many purposes, is considered to be. The only evidence of a contract, such as is now set up, appears in the affidavit of Magee; who states that, in 1810, he was in England, and agreed with Jones that the latter should ship goods on joint account, when the intercourse between the two countries should be opened; and that, in consequence of this agreement, the present shipment was made. Now admit that such an agreement was made, yet the delivery of the goods to the master of the vessel was not for the use of Magee and Jones, any more than it was for the use of the shipper solely; and, consequently, it amounted to nothing so as to divest the property out of the shipper, until Magee should elect to take them on joint account, or

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to act as the agent of Jones. Until this election was made, the goods were at the risk of the shipper, which is conclusive as to the right of property.

3. The next claim is that of Lenox and Maitland to the ship. The facts in relation to this subject are, that James Lenox, as joint owner with W. Maitland of this ship, obtained, in November, 1811, a register for her, which was granted upon his oath, that he, together with W. Maitland, *of the city of New York, merchant*, were the only owners. At this time, Maitland was domiciled in Great Britain; and it is contended that the statement, that Maitland was of New York, was untrue, and subjected the vessel to forfeiture, under the act of congress of the 31st of December, 1792; and that although no claim is interposed for the United States, still the forfeiture produced by the misconduct of Lenox, is sufficient to turn him out of Court, whatever disposition may ultimately be made of the property. The rule of the prize Court is correctly stated in this argument; and the only question is, whether a forfeiture did accrue to the United States. The act of congress directs that the owner who takes the oath, in case there are more than one owner, shall, in his oath, specify the names and places of abode of such owners, and that they are citizens of the United States, if such be the fact; and if one or more of them reside abroad, as a partner or partners in a co-partnership consisting of citizens, and carrying on trade with the United States, that such is the case. The law then proceeds to declare, that if any of the matters of fact in the said oath alleged, within the knowledge of the party swearing, shall not be true, the ship shall be forfeited to the United States. It cannot be denied that, at the time this oath was taken, W. Maitland was a resident merchant of Great Britain, carrying on trade with the United States; a fact totally inconsistent with that alleged in the oath, that he was of the city of New York. It is probable, and the Court is willing to believe, that this statement was innocently made, under a misconception of the real character which the foreign domicil of Maitland had impressed upon him. But still, the law required explicitness on this point, and marked the distinction between a person residing abroad, and one residing within the United States. It must be admitted, in point of law,

that the fact sworn to by Lenox was not true; and the consequence is a forfeiture of the ship to the United States. The claim, therefore, of Lenox and Maitland to this vessel must be rejected. What order shall be made as to the ultimate disposition of the property, must depend upon the opinion which this Court may give in some other cases touching this subject.

The great question involved in this, and many other of the prize cases which have been argued, is, whether the property of these Claimants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruizer, ought to be condemned as lawful prize. It is contended by the captors, that as these Claimants had gained a domicil in Great Britain, and continued to enjoy it up to the time when war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and, consequently, that it may legally be seized as prize of war, in like manner as if it had belonged to real British subjects. But if not so, it is then insisted, that these Claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there re-settled themselves, they became redintegrated British subjects, and ought to be considered by this Court in the same light as if they had never emigrated. On the other side it is argued, that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States; and that, until such election was, *bona fide*, made, the Courts of this country are bound to consider them as American citizens, and their property shipped before they had an opportunity to make this election, as being protected against American capture.

There being no dispute as to the facts upon which the domicil of these Claimants is asserted, the questions of law alone remain to be considered. They are two.— First, By what means and to what extent, a national character may be impressed upon a person, different

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from that which permanent allegiance gives him? and secondly, What are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or in which he had been naturalized?

1. The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, *domicil*, which he defines to be, "a habitation fixed in any place, with an intention of always staying there." Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicil, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration. *Vatt. p, 92, 93*— Grotius no where uses the word domicil, but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates *strangers*, and the latter, *subjects*; and it will presently be seen, by a reference to the same author, what different consequences these two characters draw after them.

The doctrine of the prize Courts, as well as of the Courts of common law, in England, which, it was hinted, if not asserted, in argument, had no authority of universal law to stand upon, is the same with what is stated by the above writers; except that it is less general, and confines the consequences resulting from this acquired character to the property of those persons engaged in the commerce of the country in which they reside.

It is decided by those Courts, that whilst an Englishman, or a neutral, resides in a hostile country, he is a subject of that country, and is to be considered, (even

by his own or native country, in the former case) as having a hostile character impressed upon him.

In deciding whether a person has obtained the right of an acquired domicil, it is not to be expected that much, if any, assistance should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of Courts to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicil had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is, that the Courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered, is the *animus manendi*; and Courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. This is one of the rules of the British Courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi*; and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence—*The Bernon*, 1, *Rob.* 86, 102. As to some other rules of the prize Courts of England, particularly those which fix a national character upon a person on the ground of constructive residence, or the peculiar nature of his trade, the Court is not called upon to give an opinion at this time: because, in this case, it is admitted that the Claimants had acquired a right of domicil in Great

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Britain, at the time of the breaking out of the war between that country and the United States.

2. The next question is, what are the consequences to which this acquired domicil may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of *sir W. Scott*, it is an adventitious character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*. 3 *Rob.* 17, 12. *The Indian Chief.* The reasonableness of this rule can hardly be disputed. Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his

native country, or to that where he was naturalized, or by commencing his removal, *bona fide*, and without an intention of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfect y reasonable that the evidence of a *bona fide* intention to remove should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies those declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the Courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put it in his power to claim which ever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by all ging that he had intended to remove from the country of the enemy to his own, then neutral, and, therefore, that, as a neutral, the trade was lawful? If war exist between the country of his residence and his native country, and his property be seized by the former, or by the latter, shall he be heard to say in the former case, that he was a domiciled subject of the country of the captor, and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character; and thus to parry the belligerent rights of both? It is to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned has been adopted. Upon what sound principle can a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonging to them,

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before the war, in their character of subjects of that country, so long as they continued to retain their domicil; and when a state of war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that the property, which was once the property of a friend, belongs now, in reference to that property, to an enemy. This doctrine of the common law and prize Courts of England is founded, like that mentioned under the first head, upon national law; and it is believed to be strongly supported by reason and justice. It is laid down by *Grotius, p.* 563, "that all the subjects of the "enemy who are such from a permanent cause, that is "to say, settled in the country, are liable to the law of "reprisals, whether they be natives or foreigners; but "not so if they are only trading or sojourning for a "little time." And why, it may be confidently asked, should not the property of such subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicil, or, in the words of *Grotius*, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it, (with an exception in favor of such a subject, in relation to his native country) in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their totality, is to be considered as the goods of the nation, *in regard to other states.* It belongs, in some sort, to the state, from the right which she has over the goods of its citizens which make a part of the sum total of its riches, and augment its power. *Vatt.* 147, and also *B.* 1, *c.* 14, § 182. In reprisals, continues the same author, we seize on the property of the subject, just as we would that of the sovereign; every thing that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit entrusted to the public faith. *B.* 2, *c.* 18, § 344. Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the

nation, it would seem difficult to maintain that the same consequences would not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation. If, then, nothing but an actual removal, or a *bona fide* beginning to remove, can change a national character acquired by domicil, and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person in his character of a subject, what is there that does, or ought to exempt it from capture by the privateers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent? It is contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance; and that, until such election is made, his property ought to be protected from capture by the cruizers of the latter. This doctrine is believed to be as unfounded in reason and justice, as it clearly is in law. In the first place, it it founded upon a presumption that the person will certainly remove, before it can possibly be known whether he may elect to do so or not. It is said that this presumption ought to be made, because, upon receiving information of the war, it will be his duty to return home. This position is denied. It is his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor will any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse her permission to him to withdraw whenever he wishes to do so, unless under peculiar circumstances, which, by such removal at a critical period, might endanger the public safety. The conventional law of nations is in conformity with those principles. It is not uncommon to stipulate in treaties that the subjects of each shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects either to remove or to remain. They are left free to chuse for themselves; and when they have made their election, they claim the right of enjoy-

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ing it under the treaty. But until the election is made, their former character continues unchanged.

Until this election is made, if his property found upon the high seas, engaged in the commerce of his adopted country, should be permitted, by the cruizers of the other belligerent, to pass free, under the notion that he may elect to remove, upon notice of the war, and should arrive safe, what is to be done in case the owner of it should afterwards elect to remain where he is? or, if captured and brought immediately to adjudication, it must, upon this doctrine, be acquitted until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made, is safe; and if he finds it best to return, it is safe of course. It is safe whether he goes or stays. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and well established in the prize Courts of England, and which ought not, without strong reasons which may render them inapplicable to this country, to be disregarded by this Court. The rule there, is, that the character of property, during war, cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed goes farther: as to the correctness of which in its greatest extension no opinion need now be given; but it may safely be affirmed that this change cannot and ought not to be effected by an election of the owner and shipper of it made *subsequent to the capture*, and, more especially, after a knowledge of the capture is obtained by the owner. Observe the consequences which would result from it. The capture is made and known. The owner is allowed to deliberate whether it is his interest to remain a subject of his adopted, or of his native country. If the capture be made by the former, then he elects to be a subject of that country; if by the latter, then a subject of that. Can such a privileged situation be tolerated by either belligerent? Can any system of law be correct, which places an individual who adheres to one belligerent, and, to the period of his election to re-

move, contributes to encrease her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, is altogether a novel theory, and seems, from the course of the argument, to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on this subject be correct, no such hardship can exist. For if, before the election is made, his property on the ocean is liable to capture by the cruizers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted.

It will be observed, that in the foregoing opinion respecting the nature and consequences of domicil, very few cases have been referred to. It was thought best not to interrupt the chain of argument, by stopping to examine cases; but faithfully to present the essential principles to be extracted from those which were cited at the bar, or which have otherwise come under the view of the Court, and which applied to the subject. With what success this has been executed, is not for me to decide. But there are two or three cases which seem to be so applicable, and at the same time so conclusive on the great points of this question, that it may not be improper briefly to notice them. In support of the general principles, that the national character of the owner at the time of capture, must decide his right to claim, and that a subject is condemned by it, even in the Courts of his native country, without time being allowed to him to elect to remove, the following cases may be referred to. In the *Boedes Lust*, 5 *Rob.* 247, it was decided that the property of a resident of Demarara, shipped before hostilities of any kind had occurred between Holland and Great Britain, but which was captured under an embargo declared by England upon Dutch property, as preparatory to war which ensued soon after the seizure, was, by the retroactive effect of the war applied to property so seized, to be consider-

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ed as the property of an enemy taken in war. In this case, *sir W. Scott* lays it down, that, where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the Claimants may have become friends and subjects prior to the adjudication. This case is somewhat stronger than the present, in the circumstance that in that, the state of hostility, alleged to have existed at the time of capture was made out by considering the subsequent declaration of war as relating back to the time of seizure under the embargo, by which reference it was decided to be a hostile embargo, and of course tantamount to an actual state of war. But this case also proves, not only that the hostile character of the property at the time of capture establishes the legality of it, but that no future circumstance changing the hostile character of the Claimant to that of a friend or subject, can entitle him to restitution. Whether the Claimant, in this case, was a neutral or a British subject, does not appear. But if the former, it will not, it is presumed, be contended that he is, upon the principles of national law, less to be favored in the Courts of the belligerent, than a subject of that nation domiciled in the country of the adverse belligerent. *Whitehill's* case, however, referred to frequently in *Rob. reports*, comes fully up to the present, because he was a British subject, who had settled but a few days in the hostile country, but before he knew or could have known of the declaration of war; yet, as he went there with an intention to settle, this, connected with his residence, short as it was, fixed his national character, and identified him with the enemy of the country he had so recently quitted. The want of notice, and of an opportunity to extricate himself from a situation to which he had so recently and so innocently exposed himself, could not prevail to protect his property against the belligerent rights of his own country, and to save it from confiscation. There are many other strong cases upon these points, which I forbear to notice particularly, from an unwillingness to swell this opinion already too long.

The sentence of the Court is as follows:

This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof, it is decreed and ordered that the sentence of

the Circuit Court of Massachusetts condemning the one hundred casks of white lead claimed by Lenox and Maitland be, and the same is hereby affirmed with costs. And that the sentence of the said Circuit Court as to the claim of Magee and Jones to twenty-one trunks of merchandize be, and the same is hereby reversed and annulled; and that the said twenty-one trunks of merchandize be condemned to the captors; and that the sentence of the said Circuit Court as to the ship Venus claimed by Lenox and Maitland be and the same is hereby reversed; and that the said ship Venus be condemned, the one half thereof to the captors, the other half to the United States, under the order of the said Circuit Court. That the sentence of the said Circuit Court as to the claim of Wm. Maitland to one half of one hundred and fifty crates of earthen ware, thirty-five cases and three casks of copper, nine pieces of cotton bagging and twenty and four twentieths tons of coal, be and the same is hereby reversed, and that the same be condemned to the captors; and that the sentence of the said Circuit Court, as to the claim of Alexander M'Gregor to one half of one hundred and ninety-eight packages of merchandize as the joint property of himself and Lenox and Maitland, and of the claim of Wm. Maitland for one fourth of the same goods, and of the claim of Alexander M'Gregor to twenty-five pieces of cotton bagging and five trunks of merchandize, be, and the same is hereby reversed and annulled, and that the same be condemned to the captors; and that the said cause be remanded to the said Circuit Court for further proceedings to be had therein.

JOHNSON, *J.* declined giving an opinion.

STORY, *J.* I do not sit in this cause: but the great question involved in it, respecting the effect of domicil on national character, forms the leading point in many cases before the Court. Those cases have been ably and fully argued, and I have listened, with great solicitude and attention, to the discussion. On so important a question, where a difference of opinion has been expressed on the bench, I do not feel at liberty to withdraw myself from the responsibility which the law imposes on me. The parties in the other cases have a right to my opinion; and, however painful it is, in the embarrassing

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situation in which I stand, to declare it, I shall not shrink from what I deem a peremptory duty. The question is not new to me: It has been repeatedly before me in the Circuit Court, and has been applied sometimes to relieve and sometimes to condemn the Claimant. I shall not pretend to go over the grounds of argument; but content myself with declaring my entire concurrence in the opinion expressed by Judge Washington on this point.

MARSHALL, *Ch. J.* I entirely concur in so much of the opinion delivered in this case, as attaches a hostile character to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy; and I subscribe implicitly to the reasoning urged in its support. But from so much of that opinion as subjects to confiscation the property of a citizen shipped before a knowledge of the war, and which disallows the defence founded on an intention to change his domicil and to return to the United States, manifested in a sufficient manner, and within a reasonable time after knowledge of the war, although it be subsequent to the capture, I feel myself compelled to dissent.

The question is undoubtedly complex and intricate. It is difficult to draw a line of discrimination which shall be at the same time precise and equitable. But the difficulty does not appear to me to be sufficient to deter Courts from making the attempt.

A merchant residing abroad for commercial purposes may certainly intend to continue in the foreign country so long as peace shall exist, provided his commercial objects shall detain him so long, but to leave it the instant war shall break out between that country and his own. This intention, it is not necessary to manifest during peace; and when war shall commence, the belligerent cruizer may find his property on the ocean, and may capture it, before he knows that war exists. The question whether this be enemy property or not, depends, in my judgment, not exclusively on the residence of the owner at the time, but on his residence taken in connexion with his national character as a citizen, and with his intention to continue or to discontinue his commercial domicil in the event of war.

The evidence of this intention will rarely, if ever, be given during peace. It must, therefore, be furnished, if at all, after the war shall be known to him; and that knowledge may be preceded by the capture of his goods. It appears to me, then, to be a case in which, as in many others, justice requires that subsequent testimony shall be received to prove a pre-existing fact. Measures taken for removal immediately after a war, may prove a previous intention to remove in the event of war, and may prove that the captured property, although, *prima facie*, belonging to an enemy, does, in fact, belong to a friend. In such case, the citizen, in my opinion, has a right, in the nature of the *jus postliminii*, to claim restitution.

As this question is not only decisive of many claims now depending before this Court, but is also of vast importance to our merchants generally, I may be excused for stating, at some length, the reasons on which my opinion is founded.

The whole system of decisions applicable to this subject, rests on the law of nations as its base. It is, therefore, of some importance to enquire how far the writers on that law consider the subjects of one power residing within the territory of another, as retaining their original character, or partaking of the character of the nation in which they reside.

Vattel, who, though not very full to this point, is more explicit and more satisfactory on it than any other whose work has fallen into my hands, says, "the citizens are "the members of the civil society; bound to this society by certain duties, and subject to its authority, they "equally participate in its advantages. The *natives*, or "*indigenes*, are those born in the country, of parents "who are citizens. Society not being able to subsist "and to perpetuate itself but by the children of the citizens, those children naturally follow the condition of "their fathers, and succeed to all their rights."

"The inhabitants, as distinguished from citizens, are "strangers who are permitted to settle and stay in the "country. Bound by their residence to the society, they "are subject to the laws of the state, while they reside "there, and they are obliged to defend it, because it grants

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"them protection, though they do not participate in all "the rights of citizens. They enjoy only the advan- "tages which the laws, or custom gives them. The *per-* "*petual inhabitants* are those who have received the right "of perpetual residence. These are a kind of citizens "of an inferior order, and are united and subject to the "society, without participating in all its advantages."

"The domicil is the habitation fixed in any place, "with an intention of always staying there. A man "does not, then, establish his domicil in any place, un- "less he makes sufficiently known his intention of fixing "there, either tacitly or by an express declaration. "However, this declaration is no reason why, if he af- "terwards changes his mind, he may not remove his "domicil elsewhere. In this sense, he who stops, even "for a long time, in a place, for the management of his "affairs, has only a simple habitation there, but has no "domicil."

A domicil, then, in the sense in which this term is used by *Vattel*, requires not only actual residence in a foreign country, but "an intention of always staying there." Actual residence without this intention, amounts to no more than "simple habitation."

Although this intention may be implied without being expressed, it ought not, I think, to be implied, to the injury of the individual, from acts entirely equivocal. If the stranger has not the power of making his residence perpetual, if circumstances, after his arrival in a country, so change, as to make his continuance there disadvantageous to himself, and his power to continue, doubtful; "an intention always to stay there" ought not, I think, to be fixed upon him, in consequence of an unexplained residence previous to that change of circumstances. Mere residence, under particular circumstances, would seem to me, at most, to prove only an intention to remain so long as those circumstances continue the same, or equally advantageous. This does not give a domicil. The intention which gives a domicil is an unconditional intention "to stay always."

The right of the citizens or subjects of one country to remain in another, depends on the will of the sovereign

of that other; and if that will be not expressed otherwise than by that general hospitality which receives and affords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there.

Vattel says, "enemies continue such wherever they "happen to be. The place of abode is of no account "here. It is the political ties which determine the qual- "ity. While a man remains a citizen of his own coun- "try, he remains the enemy of all those with whom his "nation is at war."

It would seem to me, to require very strong evidence of an intention to become the permanent inhabitant of a foreign country, to justify a court in presuming such intention to continue, when that residence must expose the person to the inconvenience of being considered and treated as an enemy. The intention to be inferred solely from the fact of residence during peace, for commercial purposes, is, in my judgment, necessarily conditional, and dependent on the continuance of the relations of peace between the two countries.

So far is the law of nations from considering residence in a foreign country in time of peace, as evidence of an intention "always to stay there," even in time of war, that the very contrary is expressed. *Vattel* says, "the "sovereign declaring war can neither detain those sub- "jects of the enemy who are within his dominions at the "time of the declaration, nor their effects. They came "into his country on the public faith. By permitting "them to enter his territory and to continue there, he "tacitly promised them liberty and security for their "return. He is therefore to allow them a reasonable "time for withdrawing with their effects; and if they "stay beyond the time prescribed, he has a right to treat "them as enemies, though as enemies disarmed."

The stranger merely residing in a country during peace, however long his stay, and whatever his employment, provided it be such as strangers may engage in, cannot, on the principles of national law, be considered

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as incorporated into that society, so as, immediately on a declaration of war, to become the enemy of his own. "His property," says *Vattel*, "is still a part of the tota-"lity of the wealth of his nation." "The citizen or sub-"ject of a state, who absents himself for a time, without "any intention to abandon the society of which he is a "member, does not lose his privilege by his absence; "he preserves his rights, and remains bound by the "same obligations. Being received in a foreign coun-"try, in virtue of the natural society, the communication "and commerce, which nations are obliged to cultivate "with each other, he ought to be considered there as a "member of his own nation, and treated as such."

The subject of one power inhabiting the country of another, ought not to be considered as a member of the nation in which he resides, even by foreigners; nor ought he, on the first commencement of hostilities, to be treated as an enemy by the enemies of that nation.

Burlamaqui says, "as to strangers, those who settle in "the enemy's country after a war is begun, of which "they had previous notice, may justly be looked upon "as enemies and treated as such. But in regard to such "as went thither before the war, justice and humanity "require that we should give them a reasonable time to "retire; and if they neglect that opportunity, they are "accounted enemies."

If this rule be obligatory on foreign nations, much more ought it to bind that of which the individual is a member.

I think I cannot be mistaken when I say that, in all the views taken of this subject by the most approved writers on the law of nations, the citizen of one country residing in another, is not considered as incorporated in that other, but is still considered as belonging to that society of which he was originally a member. And if war break out between the two nations, he is to be permitted, and is expected, to return to his own. I do not perceive in those writers any exception with regard to merchants.

It must, however, be acknowledged that the great ex-

tension of commerce has had considerable influence on national law. Rules have been adopted, perhaps by general consent, principles have been engrafted on the original stalk of public law, by which merchants, while belonging politically to one society, are considered commercially as the members of another. For commercial purposes the merchant is considered as a member of that society in which he has his domicil; and less conclusive evidence than would seem to be required in genere cases, by the law of nations, has been allowed to fix the domicil for commercial purposes. But I cannot admit that the original meaning of the term is to be entirely disregarded, or the true nature of this domicil to be overlooked. The effects of the rule ought to be regulated by the motives which are presumed to have induced its establishment, and by the convenience it was intended to promote.

The policy of commercial nations receives foreign merchants into their bosom; and permits their own citizens to reside abroad for the purposes of trade without injury to their rights or character as citizens. This free intercommunication must certainly be believed, by the nations who allow it, to be promotive of their interests. Nor is this opinion ill founded. Nothing can be more obvious than that the affairs of a commercial company will be transacted to most advantage by being conducted, as it respects both purchase and sale, under the eye of a person interested in the result. The nation which takes an interest in the prosperity of its commerce, can feel no inclination to restrain its citizens from residence abroad for the purposes of commerce; nor will it hastily construe such residence into a change of national character, to the injury of the individual. It is not the policy of such a nation, nor can it be its wish, to restrain its citizens from pursuing abroad a business which tends to enrich itself. It ought not, then, to consider them as enemies in consequence of their having engaged in such pursuit in the country of a friend, who, before their removal, becomes an enemy.

If, indeed, it be the real intention of the citizen permanently to change his national character, if it be his choice to remain in the country of the enemy during

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war, there can be no harshness—no injustice in treating him as an enemy. But if, while prosecuting his business in a foreign country, he contemplates a return to his own; if, in the prosecution of that business, he is promoting rather than counteracting the interests and policy of the country of which he is a member, it would seem to me to be pressing the principle too far, and to be drawing conclusions which the premises will not warrant, to infer, conclusively, an intention to continue in a country which has become hostil, from a residence and trading in that country while it was friendly; and to punish him by the confiscation of his goods, as if he was fully convicted of that intention.

It is admitted to be a general rule, that, while the state of things remains unaltered, while the motives which carried the citizen abroad continue, while he still prosecutes a business of uncertain duration, his capacity to prosecute which is not impaired, his mercantile character is confounded with that of the country in which he resides, and his trade is considered as the trade of that country.

It will require but a slight examination of the subject to perceive the reason of this rule; and that, to a certain extent, it is convenient without being unjust.

In times of universal peace, the question of national character can arise only when some privilege or some disability is attached to it, or in cases of insurance. A particular trade may be allowed or be prohibited to the merchants of a particular nation, or property may be warranted to be of a particular nation. If, in such cases, the residence of the individual be received as evidence of his national mercantile character, the subjects of enquiry are simplified, the questions are reduced to a plain one, and the various complex enquiries, which might otherwise arise, are avoided. There is, therefore, much convenience in adopting this principle in such a state of things; and it is not perceived that any injustice can grow out of it; since the individual to whom the rule is applied is not surprised by any new or unlooked for event.

So if war exists between two nations. Each bellige-

rent having a right to capture the property of the other found on the ocean, each being intent on destroying the commerce of the other, and on depriving it of every cover under which it may seek to shelter itself, will certainly not allow the advantages of neutrality to a merchant residing in the country of his enemy. Were this permitted, the whole trade of the enemy could assume, and would assume, a neutral garb.

There is, in general, no reason for supposing that a merchant residing in a foreign country, and carrying on trade, means to withdraw from it, on its engaging in war with any other country to which he is bound by no obligation. By continuing, during war, the domicil acquired in peace, he violates no duty, offends against no generally acknowledged principle, and retains all his rights of residence and commerce. The war, then, furnishes no motive for presuming that he is about to change his situation, and to resume his original national character.

These reasons appear to me to require the rule as a general one, and to justify its application to general cases. But they do not, in my opinion, justify its application to the case of a merchant whom war finds engaged in trade in a country which becomes the enemy of his own. His country ought not, I think, to bind him by his residence during peace; nor to consider him as precluded by it from showing an intention that it should terminate with the relations of peace.

When it is considered that his right to remain and prosecute that trade in which he had been engaged during peace, is forfeited; that his duty, and most probably his inclinations, call him home; that he has become the enemy of the country in which he resides; that his continuance in it exposes him to many and serious inconveniences; that his person and property are in danger; it is not, I think, going too far to say that this change in his situation may be considered as changing his intention on the subject of residence, and as affording a presumption of intending to return.

Let it be remembered that, according to the law of nations, domicil depends on the intention to reside per-

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manently in the country to which the individual has removed; and that a change of this intention is, at any time, allowable. If, upon grounds of general policy and general convenience, while the circumstances under which the residence commenced, continue the same, residence and employment in permanent trade be considered as evidence of an intention to continue permanently in the country, and as giving a commercial national character, may not a total change in circumstances—a loss of the capacity to carry on the trade, be received, in the absence of all conflicting proof, as presumptive evidence of an intention to leave the country, and as extricating the trade, carried on in the time of supposed peace, from the national character, so far as to protect it from the perils of war? At any rate, do not reason and justice require that this change of circumstances should leave the question open to be decided on such other evidence as the war must produce?

The great object for which an American merchant fixes himself in a foreign country, is, most generally, to carry on trade between that country and his own. In almost every case of this description before the Court, the Claimant is a member of a house established in the United States; and his business abroad is subservient to the business at home. This trade is annihilated by the war.

If, while peace subsists between the United States and Great Britain, while the American merchant possesses there all the commercial rights allowed to the citizens of a friendly nation, and may carry on uninterruptedly his trade to his own country, he is presumed, his intentions being unexplained, to intend remaining there always, and may, for general convenience, be clothed with the commercial character of the nation in which he resides, ought this presumption to be extended, by his own government, beyond the facts out of which it grows, if the interest of the individual be materially affected by that extension? Do not reason and justice require that we should consider his original intention as being only co-extensive with the causes which carried him to and detained him in the country, as being, in its nature, conditional, and dependent on the continuance of those causes?

If such a person were required, on his arrival in a foreign country, to declare his real intentions on the subject of residence, he would, most probably, say, if he spoke honestly, "I come for the purpose of trade: I shall remain while the situation of the two countries permits me to carry on my trade lawfully, securely, and advantageously: when that situation so changes as to deprive me of these rights, I shall return." His intention, then, to reside in the country, his domicil in it, and, consequently, his commercial character, unless he continued his trade after war, would be clearly limited by the duration of peace. It would not, I think, be unreasonable to say that the intention, to be implied from his conduct, ought to have the same limitation.

To me it seems that a mere commercial domicil acquired in time of peace, necessarily expires at the commencement of hostilites. Domicil supposes rights incompatible with a state of war. If the foreign merchant be not compelled to abandon the country, it is not because his commercial character confers on him a legal right to stay, but because he is specially permitted to stay. If in this I am correct, it would seem to follow, that, if all the legal consequences of a residence in time of peace do not absolutely terminate with the peace, yet the national commercial character which that residence has attached to the individual, is not so conclusively fixed upon him as to disqualify him from showing that, within a reasonable time after the commencement of hostilities, he made arrangements for returning to his own country. If a residence and trading after the war be not indispensably necessary to give the citizen merchant or his property a hostile character, yet removal, or measures showing a determination to remove, within a reasonable time after the war, may retroact upon property shipped before a knowledge of the war, and rescue that property from the hostile character attached to the property of the nation in which the individual resided.

The law of nations is a law founded on the great and immutable principles of equity and natural justice. To draw an inference against all probability, whereby a citizen, for the purpose of confiscating his goods, is clothed, against his inclination, with the character of an enemy, in consequence of an act which, when com-

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mitted, was innocent in itself, was entirely compatible with his political character as a citizen, and with the political views of his government, would seem to me to subvert those principles. The rule which, for obvious reasons, applies to the merchant in time of peace or in time of war, the national commercial character of the country in which he resides, cannot, in my opinion, without subverting those principles, apply a hostile character to his trade carried on during peace, so conclusively as to prevent his protecting it by changing that character within a reasonable time after a knowledge of the war.

My opinion, then, is, that a mere commercial domicil acquired by an American citizen in time of peace, especially if he be a member of an American house, and is carrying on trade auxiliary to his trade with his own country, ought not to be considered positively as continuing longer than the state of peace. The declaration of war is a fact which removes the causes that induced his residence in the foreign country. They no longer operate upon him. When they cease, their effects ought to cease. An intention which they produced, ought not to be supposed to continue. The character of his property shipped before a knowledge of the war, ought not to be decided absolutely by his residence at the time of shipment or capture, but ought to depend on his continuing to reside and trade in the enemy country, or on his taking prompt measures for returning to his own.

This is the conclusion to which my mind would certainly be conducted, might I permit it to be guided by the lights of reason and the principles of natural justice. But it is said that a course of adjudications has settled the law to be otherwise—that we cannot, without overturning a magnificient system bottomed on the broad base of national law, and of which the facts are admirably adjusted to each other, yield to the dictates of humanity on this particular question. *Sir William Scott*, it is argued at the bar, has, by a series of decisions, developed the principles of national law on this subject, with a perspicuity and precision which mark plainly the path we ought to tread.

I respect *sir William Scott*, as I do every truely great man; and I respect his decision; nor should I depart from them on light grounds: but it is impossible to consider them attentively, without perceiving that his mind leans strongly in favor of the captors. Residence, for example, in a belligerent country, will condemn the share of a neutral in a house, trading in a neutral country; but residence in a neutral country will not protect the share of a belligerent or neutral in a commercial house established in a belligerent country. In a great maritime country, depending on its navy for its glory and its safety, the national bias is perhaps so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced; and, on this account, it appears to me to be the more proper to investigate rigidly the principles on which his decisions have been made, and not to extend them where such extension may produce injustice.

While I make this observation, it would betray a want of candor not to accompany it with the acknowledgement that I perceive in the opinions of this eminent judge, no disposition to press this principle with peculiar severity against neutrals. He has certainly not mitigated it when applying it to British subjects.

With this impression respecting the general character of British admiralty decisions, I proceed to examine them so far as they bear on the question of domicil.

The case of the *Vigilantia* does not itself involve the point. But in delivering his opinion, the judge cited two cases of capture which have been quoted and relied on at bar. In each of these, the share of the partner residing in the neutral country, was restored, and that of the partner residing in the belligerent country was condemned. But these decisions applied to a trade continued to be carried on during war.

In a subsequent case, the share of the partner residing in the neutral country also was condemned; and the lords commissioners said that the principle on which restitution was decreed in each of the first mentioned cases, was, "that they were merely at the commence-

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ment of a war." They said that "a person carrying "on trade habitually in the country of the enemy, "though not resident there, should have time to with- "draw himself from that commerce; that it would press "too heavily on neutrals to say that, immediately, on "the first breaking out of a war, their goods would be- "come subject to confiscation."

On these cases it is to be observed, that, although the two first happened at the commencement of the war, yet they happened during a war; and the partners whose interest was condemned, do not appear to have discontinued their residence and trading in the country of the enemy, after war had taken place. The declaration "that it would press too heavily on neutrals to say that, immediately on the first breaking out of a war, their goods would become subject to confiscation," though applied to a neutral not residing in the belligerent country, clearly discriminates, in a case of capture, between the rights of parties at the commencement of a war, and at a subsequent period. But it is sufficient to say that neither the case itself, nor the cases and opinions cited in it, apply directly to the question before this Court.

In the case of the *Harmony*, the property of Mr. Murray, an American citizen residing in France, was condemned on account of that residence. But Mr. Murray had removed to France, during the war, and had continued there for four years.

The scope of the argument of *sir William Scott* goes to show that the single circumstance of residence in the enemy country, if not intended to be permanent, will not give the enemy character to the property of such resident captured in a trade between his own country and that of the enemy. It is material that the conduct of Mr. Murray, subsequent to the capture, had great influence in determining the fate of his property. Had he returned to the United States immediately after that event, I do not hazard much in saying that restitution would have been decreed.

In the case of the *Indian Chief*, Mr. Johnson, an American citizen domiciliated in England, had engaged

in a merchantile enterprize to the British East Indies— a trade allowed to an American citizen, but prohibited to a British subject. On its return, the vessel came into Cowes, and was seized for being concerned in illicit trade. Mr. Johnson had then left England for the United States. He was considered as not being a British subject at the time of capture, and restitution was decreed.

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In delivering his opinion in this case, *sir William Scott* said, "Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held, that, from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence, ceases by non-residence. It is an adventitious character that no longer adheres to him from the moment that he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*."

This case undoubtedly proves, affirmatively, that the national character gained by residence ceases with that residence; but I cannot admit it to prove, negatively, that this national character can be laid down by no other means. I cannot, for instance, admit that an American citizen, who had gained a domicil in England during peace, and was desirous of returning home on the breaking out of war, but was detained by force, could, under the authority of this opinion, be treated as a British trader, with respect to his property embarked before a knowledge of the war.

In the case of *La Virginie*, the property of a Mr. Lapierre, who was probably naturalized in the United States, but who had returned to St. Domingo, and had shipped the produce of that island to France, was condemned. But he was considered as a Frenchman, was residing at the time in a French colony, and was engaged in a trade between that colony and the mother country. The case, the judge observed, might have been otherwise decided, had the shipment been made to the U. States.

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In the case of the *Jonge Clarissa*, Mr. Ravie had a license to make certain importations as a British subject. He had a house in Amsterdam, went there in person during the war, and made the shipment under his own inspection and control. It was determined that, in this transaction, he acted in his character as a Dutch merchant, and was not protected by his license. This was a trading during war.

In the case of the *Citto*, the property of Mr. Bowden, a British subject residing in Holland, was condemned. It appeared that he had settled in Amsterdam, where he had resided, carrying on trade, for six years. In 1795, when the French troops took possession of that country, he left it and settled in Guernsey. The *Citto* was a Danish vessel captured in April, 1796, on a voyage from a Spanish port to Guernsey, where Mr. Bowden then resided. In June, 1796, after the capture of the *Citto*, he returned to Holland. In argument, it was contended, that it appeared that British subjects might reside in Holland, without forfeiting their British character, from the proclamation of the 3d of September, 1796, which directs the landing of goods, imported under that order into the united provinces, to be certified by *British merchants resident there.*

The judge was desirous of knowing the nature of Mr. Bowden's residence in Holland—whether he had confined himself to the object of withdrawing his property, or had been engaged in the general traffic of the place. If the former, "he may," said the judge, "be entitled to "restitution; more especially adverting to the order in "council, which is certainly so worded as not to be very "easy to be applied."

The cause stood for further proof.

It is plain that, in this opinion, the residence of the Claimant at the time of capture was not considered as conclusive. Had it been so, restitution must have been decreed, because Mr. Bowden was a British subject, and, at that time, resided in Guernsey. It is equally apparent, that, had his subsequent residence in the enemy country been for the sole purpose of withdrawing his property, the law was not understood to forbid restitution.

The language of *sir William Scott* certainly ascribes considerable influence to the proclamation, but does not rest the right of the Claimant altogether on that fact.

On the 17th of March, 1800, an affidavit of Mr. Bowden, made the 6th of August, 1799, was produced, in which he stated his residence in Holland previous to the invasion by the French. That he quitted Holland and landed in England, the 20th of January, 1795, whence he proceeded to Guernsey, where he resided with his family. That, in the month of June, 1796, he was under the absolute necessity of returning to Holland, for the purpose of recovering debts due and effects belonging to the partnership, his partner remaining in Guernsey.

The affidavit then proceeded to state many instances of his attachment to his own government, and concluded with averring that he was still under the necessity of remaining in Holland, for the purpose of recovering part of the said debts and effects, which would be impossible were he to leave the country; but that it was his intention to return to his native country, so soon as his affairs would permit where his mother and his relations reside.

The Court observed that it appeared, from the affidavit, that Mr. Bowden was, at that time, in Holland; and added, "it would be a strange act of injustice, if while "we are condemning the goods of persons of all nations "resident in Holland, we were to restore the goods of "native British subjects resident there. An Englishman "residing and trading in Holland, is just as much a "Dutch merchant as a Swede or a Dane would be."

This case was decided in 1800. Mr. Bowden had returned to Holland in 1796, during the war, and had continued in the country of the enemy. It is not denied that he continued his trade, and the fact that he did continue it is fairly to be inferred, not only from his omitting to aver the contrary, but from the language of *sir William Scott*. "An Englishman residing and *trading* in Holland," says that judge, "is just as much a Dutch "merchant as a Swede or a Dane would be." The case of Mr. Bowden, then, is the case of a British subject who continued to reside and trade in the enemy country four years after the commencement of hostilities. His

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property must have been condemned on one of two principles. Either the judge must have considered his residence in Guernsey, from January, 1795 to June, 1796, as a temporary interruption of his permanent residence in Holland, and not as a change of domicil, since he returned to that country, and continued in it, as a trader, to the rendition of the final sentence; or he must have decided that, although Mr. Bowden remained and intended to remain in fact a British subject, yet the permanent national commercial character which he acquired after this capture, retroacted on a trade which, at the time of capture was entirely British, and subjected the property to confiscation. On whichsoever of these principles the case was decided, it is clear that the hostile character attached to the property of Mr. Bowden in consequence of his residing and trading in the country of the enemy during the war. This case is, I think, materially variant from one in which the residence and trading took place during peace, and the capture was made before a change of residence could be conveniently effected.

The *Diana* is also a case, of considerable interest, which contains doctrines entitled to attentive consideration.

During the war between Great Britain and Holland, which commenced in 1795, the island of Demarara, surrendered to the British arms. By the treaty of Amiens, it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their property acquired and possessed before or during the war, in which term they may have the full exercise of their religion and enjoyment of their property.

Previous to the declaration of war against Holland, in 1803, the *Diana* and several other vessels, loaded with colonial produce, were captured on a voyage from Demarara to Holland. Immediately after the declaration of war, and before the expiration of three years from the notification of the treaty of Amiens, Demarara again surrendered to Great Britain. Claims to the captured

property were filed by original British subjects, inhabitants of Demarara, some of whom had settled in the colony while it was in possession of Great Britain, others before that event. The trial came on after the island had again become a British colony.

Sir William Scott decreed restitution to these British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held, that their settling in Demarara while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power; which presumption, recognized in the treaty, relieved those Claimants from the necessity of proving such intention. He thought it highly reasonable that they should be admitted to their *jus postliminii*, and be held entitled to the protection of British subjects.

But the property of those Claimants who had settled before it came to the possession of Great Britain, was condemned. "Having settled without any faith in British possession, it cannot be supposed," he said, "that "they would have relinquished their residence, because "that possession had ceased. They had passed from "one sovereignty to another with indifference; and if "they may be supposed to have looked again to a connexion with this country, they must have viewed it as "a circumstance that was in no degree likely to affect "their intention of continuing there." "On the situation of persons settled there previous to the time of "British possession, I feel myself," said the judge, "obliged to pronounce that they must be considered in "the same light as persons resident in Amsterdam. It "must be understood, however, that if there were among "these, any who have been actually removing, and that "fact is properly ascertained, their goods may be capable of restitution. All that I mean to express is, that "there must be evidence of an intention to remove, on "the part of those who settled prior to British possession, the presumption not being in their favor."

This having been a hostile seizure, though made before the declaration of war, the property is held equally

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liable to condemnation as if captured the instant of that declaration.

So much of the case as relates to those Claimants who had settled during British possession, proves that other circumstances than an actual getting into motion for the purpose of returning to his own country, may create a presumption of intending to return; and may put off that hostile commercial character which a British subject residing and trading in the country of an enemy, is admitted to acquire. The settlement having been made in a country which, at the time, was in possession of Great Britain, though held only by the right of conquest—a tenure known to be extremely precarious, and rarely to continue longer than the war in which the acquisition is made, is sufficient to create this presumption; but the case does not declare negatively that no other circumstances would be sufficient.

I am aware that the part of the case which applies to Claimants who had settled previous to British possession, will, at first view, appear to have a strong bearing on the question before the Court. The shipment was in time of peace, and the seizure was made before the declaration of war. The trade was one in which a British subject, in time of peace, might lawfully engage. However strong his intention might be to return to his native country in the event of war, he could not be expected to manifest that intention before the actual existence of war. The re-conquest of the island followed the declaration of war so speedily, as scarcely to leave time for putting in execution the resolution to return, had one been formed. Taking these circumstances into view, the condemnation would seem to be one of extreme severity. Yet even this case, admitting the decision to be perfectly correct, does not, I think, when accurately examined, go so far as to justify a condemnation under such circumstances as belong to some of the cases at bar.

The island having surrendered during war, such of its inhabitants as were originally British subjects were not allowed to derive, from this re-annexation to the dominions of Great Britain, the advantages to which a voluntary return to their own country, of the same

date, would have entitled them. They were considered as if they had been "residents of Amsterdam."

But *sir William Scott* observes, that "if there are "among these any who have been actually removing, "and that fact is properly ascertained, their goods may "be capable of restitution." "Actually removing"—when? Not, surely, before the seizure; for that was made in time of peace. Not before the declaration of war, when the original seizure was converted into a belligerent capture; for until that declaration was known, a person whose intention to remain or return was dependant on peace or war, would not be "actually removing." On every principle of equity, then, the time to which these expressions refer, must be the surrender of Demarara, or a reasonable time after the declaration of war was known there. The one period or the other would be subsequent to that event which was deemed equivalent to capture.

It is not unworthy of remark, that *sir William Scott* adds explanatory words which qualify and control the words "actually removing," and show the sense in which he used them. "All," says the judge, "that I "mean to express is, that there must be evidence of an "*intention* to remove, on the part of those who settled "prior to British possession, the presumption not being "in their favor.

It would, then, I think, be rejecting a part, and a material part, of the opinion, to say that an intention to remove clearly proved, though not accompanied by the fact of removal, would have been deemed insufficient to support the claim for restitution.

Were there no other circumstances of real importance in this case—did it rest solely on the sentiments expressed by the judge, unconnected with those circumstances, I should certainly consider it as leaving open to the Claimants before this Court, the right of proving an intention to return within a reasonable time after the declaration of war, by other overt-acts than an actual removal.

But there are other circumstances which I cannot

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deem immaterial; and, as the opinions of a judge are always to be taken with reference to the particular case in which they are delivered, I must consider these expressions in connexion with the whole case.

The probability is, that the Claimants were not merely British merchants. Though the fact is not expressly stated, there is some reason to believe that they had become proprietors of the soil, and were completely incorporated with the Dutch colonists. They are not denominated merchants. They are spoken of, through the case, not as residents, but as settlers. "They had "passed," said sir William Scott, "from one sove- "reignty to another with indifference." This mode of expression appears to me to indicate a more permanent interest in the country—a more intimate connexion with it than is acquired by a merchant removing to a foreign country, and residing there in time of peace, for the sole purpose of trade. And in another of the same class of cases, it is said that, previous to the last war, the principal plantations of the island were in possession of British planters from the other British islands.

The voyage, too, in making which the *Diana* was captured, was a direct voyage between the colony and the mother country. The trade was completely Dutch; and the property of any neutral, wherever residing, if captured in such a voyage, during war, would be condemned.

But it is still more material that those who settled in Demarara before British possession, must have settled during the war which was terminated by the treaty of Amiens; or, if they settled in time of peace, must have continued there while the colony was Dutch, and while Holland was at war with Great Britain. Which ever the fact might be, whether they had settled in an enemy country during war, or had continued, through the war, a settlement made in time of peace, they had demonstrated that war made no change in their residence. In their case, then, it might be correctly said, "that war "created no presumption of an intention to return"— "that they passed from one sovereignty to another with "indifference."

I cannot consider claims under these circumstances, as being in the same equity with claims made by persons who had removed into a foreign country, in time of peace, for the sole purpose of trade, and whose trade would be annihilated by war.

The case of the *Boedes Lust* differs from the *Diana* only in this: the Claimants are not alleged to have been originally British subjects. Restitution was asked, because the property did not belong to an enemy at the time of shipment, nor at the time of seizure, nor at the time of adjudication. These grounds were all declared to be insufficient. The original seizure was provisionally hostile; and the declaration of war consummated the right to condemn, and vested the property in the crown, as enemy property. The subsequent change in the character of the Claimants, who became British subjects by the surrender of Demarara, could not divest it. "Where property is taken in a state of hostility," said *sir William Scott*, "the universal practice has ever "been to hold it subject to condemnation, although the "Claimants may have become friends and subjects pri- "or to adjudication." "With as little effect," he added, "can it be contended that a *postliminium* can be at- "tributed to these parties. Here is no return to the "original character, on which only a *jus postliminii* can "be raised. The original character at the time of "seizure, and immediately prior to the hostility which "has intervened, was Dutch. The present character, "which the events of war have produced, is that of "British subjects; and, although the British subject "might, under circumstances, acquire the *jus postlimi-* "*nii*, upon the resumption of his native character, it "never can be considered that the same privilege ac- "crues upon the acquisition of a character totally new "and foreign."

This opinion is certainly not decisive; but it appears to me rather to favor than oppose the idea, that a merchant residing abroad, and taking measures to return on the breaking out of war, may entitle himself to the *jus postliminii*, with respect to property shipped before a knowledge of the war.

The *President* was captured on a voyage from the

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Cape of Good Hope to Europe. Mr. Elmslie, the Claimant, was born a British subject, but claimed as a citizen of the United States. He had removed to the Cape of Good Hope, during the preceding war, and still resided there. The property was condemned. In delivering his opinion, *sir William Scott* observed, "It "is said the Claimant is intitled to the benefit of an in- "tention of removing to Philadelphia, in a few months. "A mere intention to remove, has never been held suf- "ficient without some overt-act, being merely an inten- "tion residing secretly and undistinguishably in the "breast of the party, and liable to be revoked every "hour. The expressions of the letter in which this in- "tention is said to be found, are, I observe, very weak "and general, of an intention merely *in futuro*. Were "they even much stronger than they are, they would "not be sufficient. Something more than mere verbal "declaration, some solid fact showing that the party is "in the act of withdrawing, has always been held ne- "cessary in such cases."

It is to be held in mind, that this opinion is delivered in the case of a person who had fixed his residence in an enemy country, during war, and that he claimed to be the subject of a neutral state. For both these reasons, the war afforded no presumption of his intending to return either to his native or adopted country. To the vague expression of an intention to return at some future indefinite time, no influence can be ascribed. When the judge says that "something more than mere "verbal declaration, some solid fact showing that the "party is in the act of withdrawing, has always been "held necessary in such cases," I do not understand him to say that the person must have put himself in personal motion to return, must have commenced his voyage homeward, in order to be considered as in "the act of withdrawing." Many other overt-acts, as selling a commercial establishment, stopping business, making preparations to return, accompanied by declarations of the intent, and not opposed by other circumstances, may, in my opinion, be considered as acts of withdrawing.

In the case of the *Ocean*, *sir William Scott* said "This "claim relates to the situation of British subjects set-

"tled in a foreign state, in time of amity, and taking "early measures to withdraw themselves, on the "breaking out of war. The affidavit of claim states "that this gentleman had been settled as a partner in "a house of trade in Holland, but that he had made ar- "rangements for the dissolution of the partnership, and "was only prevented from removing personally, by the "violent detention of all British subjects who happened "to be within the territories of the enemy, at the break- "ing out of the war. It would, I think, under these "circumstances, be going further than the principle "of law requires, to conclude this person by his former "occupation, and by his present constrained residence "in France, so as not to admit him to have taken him- "self out of the effect of supervening hostilities, by the "means which he had used for his removal."

If other means for removal were taken, than arrangements for the dissolution of the partnership, they are not stated; and it is fairly to be presumed, that these arrangements were the most permanent of them, since that fact is alone selected and particularly relied upon. In his statement of the case, the reporter says that the Claimant had actually made his escape and returned to England, in July, 1803; (the trial was in January, 1804) but this must be a mistake, or is a fact not adverted to by the judge, since he says, in his opinion, that the Claimant is, at the time, "a constrained resident of France."

I shall notice two other cases which are frequently cited, though I have seen no full report of either of them.

The first is the case of Mr. *Curtissos*. This gentleman, who was a British subject, had gone to Surinam in 1766, and from thence to St. Eustatius, where he remained till 1776. He then went to Holland to settle his accounts, and with an intention, "*as was said*," of returning afterwards to England to take up his final residence. In December, 1780, orders of reprisal were issued by England against Holland. On the first of January, 1781, the *Snelle Zeylder* was captured, and, on the 5th of March and 10th of April, 1781, the vessel and cargo were condemned as Dutch property. On

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the 27th of April, 1781, Mr. *Curtissos* returned to England: and, on an appeal, the sentence of condemnation was reversed by the lords of appeals, and restitution decreed.

Other claims of Mr. *Curtissos* were brought before the Court of admiralty; and, on a full disclosure of these circumstances, restitution was decreed, before the decree of the lords in the case of the *Snelle Zeylder* was pronounced.

The principle of this decree is said to be, that Mr. *Curtissos* was *in itinere*, and had put himself in motion, and was in pursuit of his original British character.

I do not mean to find fault with this decision; but certainly it presents some strong points more unfavorable to the Claimant than will be found in some of the cases now before this Court. Mr. *Curtissos* had obtained a commercial domicil in the country of the enemy. At the time of the sailing, capture and condemnation of the *Snelle Zeylder*, he still resided in the country of the enemy. But it is said he was *in itinere*; he was in motion in pursuit of his original British character. What was this journey he is said to have been performing in pursuit of his original character? He had passed from one part of the dominions of the united provinces to another. He had moved his residence from St. Eustatius to Holland, where he remained from the year 1776 till 1781—a time of sufficient duration for the acquisition of a domicil, had he not previously acquired it. This change of residence, to make the most of it, is an act too equivocal in itself to afford a strong presumption that it was made for the purpose of returning to England. Had his stay in Holland even been short, a colonial merchant trading to the mother country, may so frequently be carried there on the business of his trade, that the fact can afford but weak evidence of an intention to discontinue that trade: but an interval of between four and five years elapsed between his arrival in Holland and his departure from that country, during which time he is not stated to have suspended his commercial pursuits, or to have made any arrangements, such as transferring his property to England, or making an establishment there, which might indi-

cate, by overt-acts, the intention of returning to his native country. This journey to Holland, connected with this long residence, would seem to me to be made as a Dutch merchant for the purpose of establishing himself there, rather than a preparatory to his return to England. But it was said that he intended to return to England. How was this intention shown? If not by his journey to Holland and his long residence there, it was only shown by his being employed in the settlement of his accounts while a merchant at St. Eustatius, a business in which he would of course engage, whatever his future objects might be. This equivocal act does not appear to have been explained, otherwise than by his own declarations; nor does it appear that these declarations were made previous to the capture.

But could I even admit that the journey from St. Eustatius to Holland was made with a view of passing ultimately from Holland to England, yet the intention was not to be immediately executed. The time of carrying it into effect, was remote and uncertain; subject to so many casualties that, had not the war supervened, it might never have been carried into effect.

But laying aside these circumstances, the case proves only that being *in itinere*, in pursuit of the native character, divests the enemy character acquired by residence and trading; it is not insinuated that this character can be divested by no other means.

Mr. *Whitehills* case, though one of great severity, does not, I think, overturn the principle I am endeavoring to sustain. He went to St. Eustatius but a few days before admiral Rodney and the British forces made their appearance before that place. But it was proved that he went for the purpose of making a permanent settlement there. No intention to return appears to have been alleged. The recency of his establishment seems to have been the point on which his claim rested.

This case, in principle, bears on that before the Court, so far only as it proves that war does not, under all circumstances, necessarily furnish a presumption, that the foreigner residing in the enemy country, intends to return to his own. The circumstances of this

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case, so far as we understand them, were opposed to the presumption that war could affect Mr. *Whitehills* residence. War actually existed at the time of his removal; and had that fact been known to him, there would have been no hardship in his case. He would have voluntarily taken upon himself the enemy character at the same time that he took upon himself the Dutch character. There is reason to believe that the Court considered him in equal fault with a person removing to a country known to be hostile. St. Eustatius was deeply engaged in the American trade, which, from the character of the contest, was, at that time, considered by England as cause of war, and was the fact which drew on that island the vengeance of Britain. Mr. *Whitehill* could have fixed himself there only for the purpose of prosecuting that trade. "He went," says *sir William Scott*, "to a place which had rendered itself particularly obnoxious by its conduct in that war." This was certainly a circumstance which could not be disregarded, in deciding on the probability of his intending to remain in the country in the event of war.

These are the cases which appear to me to apply most strongly to the question before this Court. No one of them decides, in terms, that the property of a British subject residing abroad in time of amity, which was shipped before a knowledge of war, and captured by a British cruizer, shall depend, conclusively, on the residence of the Claimant at the time of capture, or on his having, at that time, put himself in motion to change his residence. In no case which I have had an opportunity of inspecting, have I seen a *dictum* to this effect. The cases certainly require an intention, on the part of the subject residing and trading abroad, to return to his own country, and that this intention should be manifested by overt-acts; but they do not, according to my understanding of them, prescribe any particular overt act, as being exclusively admissible; nor do they render it indispensable that the overt act should, in all cases, precede the capture. If a British subject residing abroad for commercial purposes, takes decided measures, on the breaking out of war, for returning to his native country, and especially if he should actually return, his claim for the restitution of property shipped before his knowledge of

the war, would, I think, be favorably received in a British Court of admiralty, although his actual return, or the measures proving his intention to return, were subsequent to the capture. Thus understanding the English authorities, I do not consider them as opposing the principle I have laid down.

An American citizen having merely a commercial domicil in a foreign country, is not, I think, under the British authorities, concluded, by his residence and trading in time of peace, from averring and proving an intention to change his domicil on the breaking out of war, or from availing himself of that proof in a Court of admiralty. The intrinsic evidence arising from the change in his situation, produced by war, renders it extremely probable that in this new state of things he must intend to return home, and will aid in the construction of any overt-act by which such intention is manifested. Dissolution of partnership, discontinuance of trade in the enemy country, a settlement of accounts, and other arrangements obviously preparatory to a change of residence, are, in my opinion, such overt-acts as may, under circumstances showing them to be made in good faith, entitle the Claimant to restitution.

I do not perceive the mischief or inconvenience that can result from the establishment of this principle. Its operation is confined to property shipped before a knowledge of the war. For if shipped afterwards, it is clearly liable to condemnation, unless it be protected by the principle that it is merely a withdrawing of funds. Being confined to shipments made before a knowledge of the war, the evidence of an intention to change or continue a residence in the country of the enemy, must be speedily given. A continuance of trade after the war, unless, perhaps, under very special circumstances, and for the mere purpose of closing transactions already commenced, would fix the national character and the domicil previously acquired. An immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicil, and show that the intention to return had never been abandoned; that the intention to remain always had never

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been formed. It is a case in which, if in any that can be imagined, justice requires that the citizen, having entirely recovered his national character by his own act, and by an act which shows that he never intended to part with it finally, should, by a species of the *jus postliminii*, be allowed to aver the existence of that character at the instant of capture. In the establishment of such a principle, I repeat, I can perceive no danger. In its rejection, I think I perceive much injustice. An individual whose residence abroad is certainly innocent and lawful, perhaps advantageous to his country, who never intended that residence to be permanent, or to continue in time of war, finds himself, against his will, clothed with the character of an enemy, so conclusively that not even a return to his native country can rescue from that character and from confiscation, property shipped in the time of real or supposed peace. My sense of justice revolts from such a principle.

In applying this opinion to the Claimants before the Court, I should be regulated by their conduct after a knowledge of the war. If they continued their residence and trade after that knowledge, at any rate after knowing that the repeal of the orders in council was not immediately followed by peace, their claim to restitution would be clearly unsustainable. If they took immediate measures for returning to this country, and have since actually returned, or have assigned sufficient reasons for not returning, their property I think may be capable of restitution. Some of the Claimants would come within one description, some within the other. It would, under the opinion given by the Court, be equally tedious and useless to go through their cases.

My reasoning has been applied entirely to the case of native Americans. This course has been pursued for two reasons. It presents the argument in what I think its true light; and the sentence of condemnation makes no discrimination between native and other citizens.

The Claimants are natives of that country with which we are at war, who have been naturalized in the United States. It is impossible to deny that many of the strongest arguments urged to prove the probability that war must determine the native American citizen to abandon

the country of the enemy and return home, are inapplicable, or apply but feebly, to citizens of this description. Yet I think it is not for the United States, in such a case as this, to discriminate between them.

I will not pretend to say what distinctions may or may not exist between these two classes of citizens, in a contest of a different description. But in a contest between the United States and the naturalized citizen, in a claim set up by the United States to confiscate his property, he may, I think, protect himself by any defence which would protect a native American. In the prosecution of such a claim, the United States are, I think, if I may be excused for borrowing from the common law a term peculiarly appropriate, *estopped* from saying that they have not placed this adopted son on a level with those born in their family.

LIVINGSTON, *J.* concurred in opinion with the Chief Justice.

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THIS was an appeal from the decree of the Circuit Court for the district of Maryland.

Goods purchased by British merchants, before the war, between the United States and Great Britain, in pursuance of orders from American citizens, shipped to the agent of the British merchants in the United States, also an American citizen, "on account and risk of an American citizen," and no circumstances of fraud or un-

The following are the material facts of the case:

The ship Merrimack, owned by citizens of the United States, sailed from Liverpool for Baltimore, a few days after the declaration of war, by the United States against Great Britain, *was known* in that country, having on board a cargo of goods shipped by British subjects, and consigned to citizens of the United States. On the 25th of October, 1812, she was captured, in the Chesapeake bay, between Annapolis and Baltimore, by the private armed vessel *Rossie, Joshua Barney*, commander.

The goods, being libelled as prize in the District

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Court of Maryland, were severally claimed by sundry citizens of the United States.

These several claims, and the circumstances connected with them respectively, were thus stated by MARSHALL, *Ch. J.* in delivering the opinion of the Court:

1. William and Joseph Wilkins, merchants of Baltimore, claimed the goods contained in eleven cases and one bale marked W. J. W.

These goods were made up for them, in pursuance of their orders, before the war was known in Great Britain, by a manufacturing company, one member of which, Thomas Leich, resided in Leicester, in Great Britain, and the other, Edward Harris, was an American citizen residing in the United States.

The bill of parcels was in the name of Messrs. William and Joseph Wilkins. This paper also served for an invoice, and there was no other on board for these goods.

The bill of lading was in the name of Edward Harris, who was the consignee.

The goods were accompanied by a letter from Thomas Leich to Edward Harris, dated Leicester, the 29th of July, 1812, in which he says, "With this you will "receive bill of lading of 11 cases of worsted and cotton "hosiery for Messrs. W. and J. Wilkins, Baltimore, "and with insurance to 892*l.* 5. It is a large sum, "but, from what I can learn, they are very respectable. "Indeed Mr. Brown of the house of Chancellor & Co. "came with him, and seemed almost offended that did "not send the cotton hose he ordered before, and said "he would guarantee the amount of the worsted goods, "therefore must have offended him if did not comply. "Have not sent but about half the cotton goods they "ordered," &c. "informed them that we thought it "necessary to secure our property to ship all to you, "as you could prove that they were American proper- "ty by making affidavit they are *bona fide* your proper- "ty. As our orders in council are repealed, hope your "government will be amicably inclined as well, and

fairness appearing in the transaction—were vested in the American citizens at the time of the shipment, and are not liable to condemnation, although the vessel sailed from England after the declaration of war was known there. Restitution.

But if goods be purchased as above, though the accompanying invoices, bills of lading and letters be addressed by the British consignors to the American citizens for whom the purchase was made, and all concur to show the property to be in them, yet if these documents are inclosed in a letter from the consignors to their agent in the U. States, though an American citizen, directing him not to deliver the goods in case of the existence of certain circumstances, nor until he should have received payment from the consignees in cash—the pro-

"that trade will be on regular footing again, but for "fear there should be some other points in dispute, I "shall send you, and our friends through your hands, "all the goods prepared for your market which you'll "perceive is very large." "Hope you will approve "of my sending all, and as there may have been some "alterations in some of your friends, shipping them to "you gives the power of keeping back to you."

There was also on board, a letter dated Leicester, 22d July, 1812, signed Harris, Leich & Co. and addressed to Messrs. Wm. and Joseph Wilkins, merchants of Baltimore, in which they say, "The repeal "of the orders in council having been agreed on by our "government, we have availed ourselves of the oppor- "tunity of sending the greater part of your spring and "fall orders," &c. "As we are not certain that your "government will protect British property, we have "thought it right to ship all ours under cover to Mr. "Harris, who can claim as his own *bona fide* property, "and he, being a citizen of the United States, thought "proper to use every precaution, having received some "unpleasant accounts about your government having "agreed on war with this country, which we hope will "not be the case."

2. M'Kean and Woodland, citizens of the United States, claim sundry parcels of goods, part of the same cargo, as their property.

These goods were purchased by Baily, Eaton and Brown, merchants of Sheffield, in pursuance of orders from the Claimants. They were shipped to Robert Holladay, also an American citizen. The bill of lading was to Robert Holladay, "*on account and risk of an American citizen.*" The invoice was also headed to Robert Holladay.

A letter from Baily, Eaton and Brown to Samuel M'Kean, dated 11th July, 1812, says, "A few days "ago we received a letter from Mr. Rogerson, of New "York, informing us that the partnership of Messrs. "M'Kean and Woodland was dissolved, but he does "not say whether you or Mr. Woodland continue the "business, or whether both of you decline it. We have "purchased about 3,000*l.* sterling of goods by order of

perty in the said goods continued in the British consignors at the time of capture. Condemnation

Goods by the same ship, purchased as above, & consigned to the agent of the consignors, being an American citizen, in whose name also the bill of lading is made out, but the bill of parcels and invoice in the name of the American merchants for whom the purchase was made; the shipment also being expressed to be on their account, though the goods are spoken of in the letter of the consignors as British property; vested in the American merchants at the time of shipment. The circumstance that the goods continue, during the whole voyage, at the risk of the shippers, is immaterial. Restitution.

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"the late firm, and on their account, most of which "have been purchased and paid for by us, from fifteen "to eighteen months ago, and have been on our hands "waiting for shipment. We have this day given orders "to our shipper at Liverpool, to put them on board a "good American vessel sailing for your port with a "British license; but from the uncertainty we are in "respecting the particulars of your dissolution of part-"nership, and, in fact, not knowing whether to consign "them to you or Mr. Woodland, we have finally con-"cluded to consign them to Mr. Holladay, with whom "you will be pleased to make the necessary arrange-"ments respecting them." "We have addressed the "invoice to Mr. Holladay to your care; and directly "on receiving it, if he should not be in Baltimore, you "will please advise him of its arrival."

The residue of the letter contains their reasons for hoping that Mr. M'Kean will not insist on the usual credit, but will remit immediately on receiving the goods. This request is founded on their having been so long in advance for the purchase of them.

Messrs. Baily, Eaton and Brown addressed a letter to Mr. Holladay, dated the 10th of July, 1812, in which they say, "Enclosed you will receive invoices of sundry "goods for Messrs. M'Kean and Woodland, which "complete their orders." They then assign the same reason for shipping the goods to Mr. Holladay, that is given in their letter to Mr. M'Kean; and, after directing him to arrange with Mr. M'Kean, add, "We can-"not view this consignment at all in the light of an in-"tercepted shipment coming within the meaning of the "articles of agreement between you and us." This letter also contained a proposition for immediate remittance, founded on the time which had elapsed since the goods were purchased. This proposition, they say, is made to all their friends in the United States, and they hope none will refuse to accede to it. "But," they add, "in thus acting, we have left the matter to the free and unbiassed will of our friends, and they are certainly upon *honor*."

3. Messrs. Kimmel and Albert, merchants of Baltimore, claimed seven packages of goods on board the

Merrimack, which were purchased, in pursuance of their orders, by Baily, Eaton and Baily. The invoice, bill of lading, and letters, addressed (one by the consignors and the other by the shipper, who was their agent) to Messrs. Kimmel and Albert, concur in showing property in the Claimants. But all these documents and letters are inclosed in a letter of the 5th of August, 1812, written by Baily, Eaton and Baily to Samuel M'Kean. In this letter, the writers refer to a former letter of the 3d of July, in which they informed Mr. M'Kean that they should, on the recommendation of their general agent, Mr. Hollaway, inclose their invoices and bills of lading for the adjacent country to him, and requested him to make inquiries into the circumstances of their correspondents, and be regulated, as to putting the letletters, &c. into the post-office so as to reach the persons to whom they might be addressed, by the result of those inquiries. Messrs. Baily, Eaton and Baily indulge the hope that the repeal of the British orders in council will restore peace between the two countries, in which event M'Kean is still to be governed by their letter of the 3d of July. "But," they add, "if, when "you receive our invoices and bills of lading, a state "of war should really continue, it will be proper not "to deliver these goods until you have received the "amount of the invoices from the consignees, in cash."

4. John H. Browning & Co. were also Claimants of part of the cargo.

This claim stood on precisely the same principles with that of Kimmel and Albert. The documents given in evidence, were, in effect, the same, and were enclosed in the same letter from Baily, Eaton and Baily to Samuel M'Kean.

It was contended by the captors, in the District Court, that, from the papers and letters on board, it appeared that the goods were not sold and delivered in England, so as to vest the property in the Claimants, but were sent to the agents of the shippers in the United States, to be delivered or not, according to their discretion: consequently, that the property was not changed, and the goods, therefore, were liable to capture as British property.

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Restitution was decreed in the District Court, and the decree was affirmed in the Circuit Court. An appeal was taken to this Court, where the captors pray condemnation on the same grounds as in the Courts below.

HARPER, *for the Appellants,*

After stating the facts of the case, argued that the claims of the captors to the several parts of the cargo in question all rested on the same principle; viz. That no transfer of the property had taken place at the time of the capture. The shippers were British subjects.

1st. As to the property claimed by William and Joseph Wilkins.

It appears, from the evidence introduced into this part of the cause, that the goods were not to be delivered to the Claimants, until they had come first to the hands of the shippers' agent, who was to decide upon the solvency of W. and J. Wilkins, and to regulate himself accordingly, with regard to the delivery of the goods. He even had a power, under certain circumstances, to make them his own. W. and J. Wilkins were also to have an option, either to take the goods or not. But a more powerful argument than either, is, that the shippers themselves, in their letters both to the consignee and the Claimants, denominate these goods *British property*, and express their apprehensions that the American government will not protect it. Again, if these goods had been lost at sea, they could not have been charged to the Messrs. Wilkins, as goods sold and delivered. The loss would clearly have been the loss of the shippers. The property in this part of the cargo cannot, therefore, be considered as having been vested in W. and J. Wilkins. It was clearly in the British shippers, both at the time of shipment, and at the time of capture. The claim of the Messrs. Wilkins ought, therefore, to be rejected.

2d. As to the claim of M'Kean and Woodland, HARPER, stated the facts, and prayed condemnation on the general principle that the property had not been transferred.

3d and 4th. In opposing the respective claims of Kim-

mel and Albert, and of John H. Browning & Co. the counsel for the captors argued on nearly the same grounds as in the case of W. and J. Wilkins; and, in addition thereto, he urged the condition of payment which was annexed to these two cases, and which was to be performed before the delivery of the goods to the Claimants.

He also made a second point, in regard to all the claims, viz. That, admitting the goods to have been the property of American citizens, yet, since the declaration of war was known in Liverpool, at the time of the shipment, the Claimants are to be considered as having been engaged in a hostile trade, which gives the property an enemy character, and subjects it to condemnation. The shippers on this supposition, must be looked upon as the agents of the Claimants and the acts of agents, are, in law, the acts of their principals.

PINKNEY, *contra, for the Claimants.*

If the title of the Claimants be good in equity, it is sufficient; but it is good at law, as well as in equity.

In examining the several claims, I shall follow the order which has been pursued by the counsel for the captors.

First, as to the claim of W. and J. Wilkins. The invoice and bill of parcels show the purchase by the Claimants. The bill of parcels is always good evidence, in an action on a policy, to show interest. The invoice corresponds with the bill of parcels and is not contradicted by the bill of lading. Leich's letter to Harris speaks of the goods as being "for Messrs. W. and J. Wilkins." These circumstances are strongly in our favor. It has been urged, however, on the other side, that the property of the goods could not have been in the Claimants at the time of capture, because, 1st. There was a condition of payment, without complying with which, the goods were not to be delivered; and 2d, because there was a power vested in Harris, to keep back the property, in case of the insolvency of the Wilkins's. The first objection is founded on an error in fact. The objection, if applicable to the Claimants of the other parts

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of the cargo is not so here. It appears, indeed, in some part of the evidence, that an inducement to prompt payment was held out to the Wilkins's, viz. an offer to allow seven per cent. discount for prompt payment; but there was no express condition of payment. The second objection, viz. that Harris was empowered to keep back the goods, in case of the insolvency of the Claimants, is easily answered. Insolvency of the parties was the sole ground on which Harris could retain the goods; but this is only the same power which the shipper himself would have had by the general law in maritime cases, if he had consigned the goods directly to the Wilkins's. It is the general law, in case of the insolvency of the consignee, that the shipper may stop the goods *in transitu in itinere*, although purchased in England, if the purchase was on credit. The intervention of Harris, in this case, merely gives a facility to the right which the shippers before possessed. 4 *Rob.* 21, 25. *The Josephine.*

It is also urged, that the shippers themselves, in their letters, have denominated the goods in question, *British property*, and expressed an apprehension that it would not be protected by the American government, and have therefore suggested to Harris, that he could swear they were *his*. This objection possesses little weight. A mere attempt to conceal belligerent property only deprives the party of the benefit of *further proof*, but is not a ground of confiscation. 4 *Rob.* 161, 195. *The Madonna delle Gracie.—Gregory's case.*

2d. As to the claim of M'Kean and Woodland. Two objections to this claim, arising from the letter of Baily, Eaton and Brown to M'Kean, have been urged by the captors.

1st. The consignment to Holladay.

2d. The expectation of the shippers that M'Kean and Woodland would pay cash.

The consignment to Holladay needs no farther explanation than is to be found in the letter which states the fact. The shippers, having heard that the partnership of M'Kean and Woodland was dissolved, were uncertain to which of them the consignment ought to be made, and

therefore determined to consign the goods to Holladay. But the property vested in M'Kean and Woodland, notwithstanding this intermediate consignment. In a Court of prize, such intermediate consignment is not considered as altering, in any degree, the nature of the case.

2d. Though the letter from the shippers requests an immediate cash payment, there is no express condition to that effect: there is merely an appeal to the justice and honor of the Claimants.

An additional proof that the property was in the Claimants, is, that it was insured for them and not for the shippers.

It appears that all the bills of lading, except that for W. and J. Wilkins, express the shipments to have been made on account and risk of American citizens generally. The reason for this general mode of expression was the uncertainty of the shippers respecting the dissolution of the partnership.

3d and 4th. We now come to the claims of Kimmel and Albert, and Browning & Co. which depending on precisely the same principle, will be examined together.

In these two cases only, is there an absolute condition of payment. But the goods had been regularly ordered by the Claimants, long before they were shipped. They were finally shipped for them, and in pursuance of their orders. They were delivered to the master of a general ship. The invoice, bill of lading and letters, all concur in showing property in the Claimants. The legal property vested in them by the delivery of the goods to the master. The shipper, having delivered them to the master, was *functus officio*, and could not thereafter stop the goods on any ground but the insolvency of the consignee, which is the only case of stoppage *in transitu* authorized by the common law or the law maritime. 1 *Rob.* 181, 219. *The Aurora.* (*Conversation between sir W. Scott and Dr. Lawrence.*) 6 *Rob.* 325, 6, 7. *The Constantia.*

Again. Can a captor divest the eventual rights of citizens, or does he take the property subject to the conditions to which it would be subject in the hands of the consignor or his agent? We contend for the latter doc-

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trine. The rights of the citizen become absolute upon his complying with those conditions. In the present case, if the goods had arrived at their port of destination without capture, the title to them would have become absolute in Kimmel and Albert, upon payment to the consignor of the amount required: And, as the captor, according to our doctrine, does but stand in the place of the consignor, we contend that the property will become equally absolute in the Claimants upon making the same payment to him.

We do not admit the doctrine, that property cannot, upon the high seas, pass *in transitu*, so as to defeat the captors. Suppose it had been agreed that the property should change after it had passed a certain degree of longitude; would not the agreement be carried into effect, upon that degree of longitude being past? But it is not now necessary to contend for this doctrine, because the property in the present case, was vested in the Claimants, upon the shipment, liable, however, to be divested upon a condition.

There is manifest inconsistency in the English prize law. A belligerent lien will be condemned, but a neutral lien will not be protected: neutral property may become belligerent *in transitu*, but belligerent property cannot become neutral. This Court will adopt the reason of the rule, but not the rule itself.

HARPER, *in reply*.

In this case, there was no transfer of either an equitable or legal right. In the case of W. and J. Wilkins, the delivery of the goods was only to Harris; or to the master of the ship, who, by undertaking to deliver them to Harris, became *his* agent, and not the agent of the Wilkins's. So with regard to the invoice, bill of lading and bill of parcels; they were all delivered, not to the Wilkins's, but to Harris or his agent, the master. No evidence of the title of W. and J. Wilkins was put in a course to reach them, but through the agency of Harris, who was not to deliver it at all, but in a certain event. The goods, although purchased by order of the Claimants, were not delivered to them. The Claimants could not have maintained an action for them, either at law or in equity.

M'Kean and Woodland's case is still stronger against them. The business of that concern was not continued by any person. They have become insolvent. Holladay has the absolute control over the goods. He was to make arrangements with the Claimants or with M'Kean alone, and was to require cash.

*Saturday, March 12th. Absent....*LIVINGSTON, *J.*

MARSHALL, *Ch. J.*

After stating the facts relating to the several claims in this case, delivered the following opinion of the Court, as to the claims of M'Kean and Woodland, Kimmel and Albert, and John H. Browning & Co.

1. As to the claim of M'Kean and Woodland.

The question of property, in this case, depends on certain letters written by Baily, Eaton and Brown, which were found on board the captured vessel. A letter of the 11th of July, 1812, addressed to Samuel M'Kean, shows in the clearest manner, that the property in dispute was purchased and shipped for M'Kean and Woodland, in pursuance of their orders; and accounts for assigning it to Mr. Holladay.

There is nothing in the cause which can throw the slightest suspicion on the fairness of this transaction. It unquestionably is, what, on the face of these letters, it purports to be, a purchase for M'Kean and Woodland, made in pursuance of their orders, and shipped for them to Robert Holladay, because, in the moment of shipment, information was received that their partnership was dissolved, and the shipper had no instructions in what manner to direct to them. In this situation, he considered himself as acting most certainly for their advantage by addressing the goods to an agent residing in the same town with M'Kean and Woodland, who should receive them to their use. In such a case, the Court is of opinion that the property was vested in M'Kean and Woodland, and is, consequently, not liable to condemnation as enemy property

The sentence is affirmed.

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2. As to the claim of Kimmel and Albert.

From their letter it is apparent that, in the event of war, Baily, Eaton and Baily, reserved to themselves that power which ownership gives over goods, and instructed their agent, M'Kean, in what manner that power was to be exercised. There being no letter addressed to Kimmel and Albert, but under cover to M'Kean, it is apparent that they were to know nothing of the shipment, unless, in the opinion of M'Kean, it should be prudent to make the communication; and even then, the property was to become theirs, not under the original contract, but under a new contract to be made with M'Kean. The delivery on board the ship was a delivery to M'Kean, not absolutely for Kimmel and Albert, but for them provided they acceded to new and distinct propositions made by Baily, Eaton and Baily. In such a case, no change of property could take place till Kimmel and Albert should accede to these new propositions; and the capture having taken place before the contract was complete, the goods must be considered as enemy property.

The sentence is reversed, and the claim dismissed.

3. The claim of John H. Browning & Co.

This claim stands on precisely the same principles with that of Kimmel and Albert. The documentary evidence is in effect the same, and was enclosed in the same letter from Baily, Eaton and Baily to Samuel M'Kean. The claim therefore must be dismissed.

The sentence is reversed and the claim dismissed.

JOHNSON, *J.* delivered the opinion of the majority of the Court, as to the claim of W. and J. Wilkins, as follows:

The points of distinction between this case and that of M'Kean and Woodland, unfavorable to these Claimants, are the following:

1. That Harris, the direct consignee, had a control given him over the goods, which authorized him, had

he thought proper, to refuse to deliver them over to the Wilkins's.

2. That Harris had also a power, under certain circumstances, to make them his own.

3. That, in the letters both to the Wilkins's and Harris, the consignor alleges as his reason for making the shipment through Harris, his fears that this government would not protect British property; thereby; as is contended, acknowledging this property to be British.

On the other hand, it is a circumstance favorable to this claim, that the original bills of parcels were made directly to the Claimants, and were sent along with the shipment, as a substitute for an invoice.

It is assumed as a postulate, that a direct consignment on account of the consignee, made in pursuance of his orders, is not subject to condemnation as prize of war; and that it is immaterial whether it be purchased for cash or credit; or insured in the enemy's country or elsewhere.

It will, then, be enough to show that every beneficial interest which such a shipment would vest in the consignee, was vested in the Claimants in this case.

The first difficulty arises from the circumstance that the bill of lading was made out to Harris, and not to the Wilkins's, whereby the captain of the ship became bound to deliver them to Harris or his assigns.

Upon a fair view of the whole transaction, this distinction will be found rather to be formal than real; and that it produces no difference in the state of right between these parties.

The interest vested in the consignee by the delivery to the captain, is not absolute to all purposes. So far as relates to the right of stoppage *in transitu*, it continues subject to the control of the consignor, and may be reduced by him into possession, before actual delivery; or the authority of the captain to deliver them

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according to the original bills of lading, may be countermanded, and another destination given them.

Upon comparing all the circumstances of this case, it will be found that the transaction was so arranged as to produce no other change in the rights of the parties, than to put it in Harris's power to exercise this right of stoppage *in transitu*, in case of the insolvency of the Wilkins's.

The bill of lading is made out to Harris, which gave him the right to demand the goods of the captain.

But the invoice, which has the additional strength of a bill of parcels, is made out to the Claimants, which gave them the right to demand the goods of Harris.

Both in the letter to Harris and to the Wilkins's, the shipment is declared to be on account of the latter; and, in the letter to the former, the shipper goes into a detail of his reasons for giving the Claimants so large a credit.

Thus these papers, taken together, place the interest of the Claimants on the same footing as if the bill of lading had been made out to Harris for the use of the Wilkins's; and in that case, there could have been little doubt that the claim must be sustained.

If the invoice, although made out to the Claimants, had been inclosed to the direct consignee, it would have furnished a strong argument in favor of the captor. But here, the evidence of right is placed in the Claimants' own hands; thereby acknowledging their right in the goods shipped, and furnishing them with the means of asserting it. Thus the shipper could never have denied the rights of the Claimants in this case; for he had furnished the most direct and conclusive evidence against himself.

But it is asserted that Harris had it in his power to make these goods his own, in defiance of the will of the Claimants.

If this were the fact, it would only show that, in

either view of the alternative, it was a shipment on American account, and that the shipper had parted with all his interest.

But the fact is not so: and in answering this argument, we answer the remaining one also.

The shipper knew what he was about. War was already probably declared, and he was aware of the crash of mercantile credit which generally follows on such an event. He also knew that, in case of asserting his right of stoppage *in transitu*, the property reverted and became British; in which case, as he expresses himself, the property might be subjected to seizure, as enemy's property.

With these considerations on his mind, he makes out the bill of lading to Harris, and informs him that his object is to enable him to keep the goods back in case of an alteration in the circumstances of the Claimants: and in this case only is the hint given him that he may claim them as his own. It is contended, that he acknowledges, in his letter to the Claimants, that the property is British. But this is an error in fact. It was necessary to assign some reason or some excuse for not having the bills of lading made out to the Claimants themselves. And for this reason, he urges an apprehension that our government would not protect British property. But this reason could only be applicable in the event of a stoppage *in transitu*; as a direct shipment to the Claimants would have left no room for such an apprehension. In the letter, also, to Harris, it is said, is contained an acknowledgment that the property is British. This, also, is founded in mistake; for the letter to Harris only communicates the reason which had been assigned in the other letter, for having the bill of lading made out as it was. But suppose the passage in the letter to the Claimants, on this subject, had been full and explicit to the declaration of an opinion that the property continued British, although shipped on American account; yet this would have been but an expression of an erroneous opinion, and certainly ought not, as far as the interests of the Claimants are concerned, to have an influence on the decision of this Court. But it is asserted that the goods continued, on the whole voyage at the risk of

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the shippers. This may be true, and yet it does not prove enough. Had the shipment been direct to the Claimants, and insurance omitted contrary to order or custom, the shippers would have been equally liable, and yet the property would not have been subject to capture. It is enough for the purposes of the Claimants, that the property in the goods had been transferred to them, independently of the control of the shipper or his agent, except so far as the right to stop *in transitu* interfered. And such was the situation of the rights of the parties in this case. The goods ordered by the Claimants were shipped to an agent for their use, subject only to a right which unquestionably, under any circumstances, existed in the shippers. In their letter to the Claimants, they inclose a bill of parcels, by way of invoice, containing a positive acknowledgment of the sale to them; and the letter itself, as well as that to Harris, speaks of the goods expressly as *their* goods. The immediate consignee could, therefore, only be considered as the bailee of the Claimants. Nor does it appear that a tender of the money would have been necessary to entitle them to receive the goods of Harris, as, in the letter to Harris, it is acknowledged to be a sale on credit, and particular discounts offered as an inducement for an early payment.

Indeed, there are words in the letter to the direct consignee, which amount to a positive declaration that the shipments were not on his account nor on that of the shippers, but for the use and benefit of others. "I shall send you, *and our friends* through your hands, all the goods prepared for your market." By connecting these words, with the bills of lading, the result is, that, although the direct consignee was entitled to demand the goods of the captain, yet it was not to his own use, but to the use of the several persons on whose account they were shipped.

Decree affirmed.

STORY, *J.* delivered the following separate opinion, as to the claim of W. and J. Wilkins.

I cannot concur in the opinion of the Court, just delivered, as to the claim of the Messrs. Wilkins. It is true that the goods were purchased pursuant to the orders of Messrs. Wilkins; but I do not think that the

property, by the mere purchase, became vested in them; and the usage and course of trade is generally otherwise. The purchase was made with the money of the shipper: and, until a delivery, actual or constructive, to the Messrs. Wilkins, the propriety thereof remained completely in the shipper. The goods were also shipped as the property of the shipper, consigned to the agent of the shipper, and not to the agent of the Messrs. Wilkins, to be delivered only in case of the consignee's being satisfied of their perfect solvency. It is true that the bill of lading purports that the goods are shipped on account and risk of the consignee; but the confidential letters explain the transaction. and shew that the shipment was so made as a cover against belligerent risks; and that the property was not intended to be changed from the British shipper, in its transit. The delivery, then, of the goods on board of a general ship, was no delivery to the Messrs. Wilkins: It was not even a delivery which vested the property of the goods, in the consignee. The legal property and possession thereof still remained in the shippers; and if the goods had actually come to the hands of Mr. Harris, his possession would have been but a continuation of the possession of the shipper. In contemplation of law, the goods were as much under the control and possession of the shipper, as if he had been on board the vessel during the voyage, or had shipped them in his own name. If they had been lost during the voyage, the loss would have been his. He had not a mere right of stoppage *in transitu* in case of insolvency, for that can be exercised only where the property by the shipment is vested in the consignee for his own use; but he had a perfect right of countermand in all cases whatever. He might sell the property, give it a new direction, control its delivery, and, indeed, exercise all the rights of full dominion and propriety. It seems to me, that if the Messrs. Wilkins had neither a *jus ad rem*, nor a *jus in re*, and the latter only is recognized in prize Courts, they could not, by subsequent acts, overreach the legal rights of the captors. At the time of the shipment and capture, it was, in my view, enemy property liable to condemnation, having no neutral or American *onus* attached to it. It was subject to the legal claims of the creditors of the shipper; and nothing existed in the Messrs. Wilkins but a mere *spes occupandi* or, as the common law phrases it, a mere possibility, which attached

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neither to the substance nor the form of the thing. Upon what ground, then, if I am right as to the ownership of the goods, can the claim be maintained? The right of capture acts upon the proprietary interest of the thing captured, at the time of capture. It is not affected by the secret liens, or private engagements of the parties. It repudiates even the strong claim of a bottomry bond, because it is not a *jus in re*. Can, then, a mere possibility be of more consideration in a Court of prize? The absence of all authority to this effect, and the strong and emphatic language of all the cases as to secret liens, speak as powerfully as the most direct and pointed decisions against it.

There is a case cited by the Court in the *Aurora*, 4 *Rob.* 218, where property was shipped by a merchant in Holland to A. a person in America, by order of B. and *per account of B.* but with directions to A. not to deliver it unless satisfaction should be given for the payment; and it was held as good prize on the ground that the property still remained in the enemy shipper. This case I think strongly in point; and the manner in which Lawrence attempted to distinguish it from the case then on trial, shews a full concurrence in its correctness. The reasoning of the Court in the *Aurora* itself, and in the *Marianna*, 6 *Rob.* 22, are also illustrative of the general doctrine.

On the whole, I consider that, by the doctrine of the common and the prize law, these goods were, at the time of capture, enemy property; and that the claim of the Messrs. Wilkins, ought to be rejected; and in this opinion I have the concurrence of TWO* of my brethren.

Monday, March 14th.

HARPER, suggested diminution of the record in the case of W. and J. Wilkins, and prayed the Court to grant a writ of *certiorari* to the Court below; but the Court refused, the case having been argued and decided.

* Judges WASHINGTON and TODD.

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(Thompson and al. Claimants.)

THIS was an appeal from the sentence of the United States' Circuit Court for the district of Rhode Island.

A naturalized citizen, who, in time of peace, returns to his native country for the purpose of trade, but with the intention of returning again to his adopted country, continuing in the former a year after the knowledge of the existence of war between the two countries, for the purpose of winding up a complicated business, and engaging in no new commercial transactions whatever with the enemy, and actually returning to his adopted country in a little more than a year after his first knowledge of the war; is to be considered as having gained a domicil in his nativ country—and his goods, captured after the war, liable to condemnation. Goods appearing by the ships papers to be a consignment from alien enemies to American mer-

The facts were as follow:

War was declared by the United States against Great Britain on the 18th of June, 1812.

The ship *Frances*, having on board a cargo of goods of British manufacture, consigned to various persons in the United States, sailed from Greenoch, in Scotland, on the 19th of July, in the same year, for New York. On the 28th day of August following, she was captured by the Yankee privateer, and carried into the district of Rhode Island, where the cargo was libelled as enemy property.

Robert and James Thompson and William Steele, naturalized citizens of the United States, claimed a considerable part of this cargo as their own property; and also claimed 130 packages, another part of the same cargo, as being owned by them jointly with British subjects, or as having a lien upon the property in consequence of advances made upon the consignment.

These goods were all consigned by James Thompson, a naturalized citizen of the United States, residing in Scotland, to William Steele, a citizen of the United States, carrying on the business of the concern in New York.

All the goods claimed, except the 130 packages, were incontestibly the property of the Claimants; and, on the trial, restoration of two thirds was decreed to Robert Thompson and William Steele, residents in the United States; in which decree the captors acquiesced. The remaining third, which belonged to James Thompson, who resided in Scotland, was condemned: and from this sentence he has appealed to this Court.

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The 130 packages were also condemned as enemy property; and from this sentence the Claimants have appealed to this Court; but, having received more full information than they originally possessed respecting the ownership of these goods, they now abandon their claim as to this property, except as to 66 boxes, of which they still claim to hold a moiety; the other moiety being acknowledged to be the property of Messrs. Dalgleish and Frame, British subjects.

chants, condemned in toto as prize, although further proof was offered that American merchants were jointly interested, and that they had a lien upon the goods, in consequence of advances made by them. Further proof on these points refused.

A claim to all the above mentioned goods was also interposed by the United States, for a violation of the non-intercourse laws: which claim was rejected in the Circuit Court, and an appeal taken to the Supreme Court.

James Thompson, as appeared from the evidence, was a native of Scotland, and came to the United States in the year 1793, where he resided, carrying on trade and commerce, till the year 1801. In 1797 he was naturalized. In the year 1801 he went to France, on the commercial business of his house, and, some time afterwards, passed over to England, where he was employed in making purchases for and shipments to his house. In the year 1803 he settled in Glasgow, where he continued doing that part of the business of the partnership which was to be transacted in Great Britain, until the declaration of war. After the knowledge of that event, he transacted no commercial business whatever, and was exclusively employed in arranging his affairs in such manner as would enable him to return to the United States. This being accomplished, he, in August, 1813, engaged a passage on board the cartel ship the Robert Burns, about to sail from Liverpool to New York, but was stopped by the orders of government. He then passed over to Ireland, and privately embarked for the United States, where he arrived in November last. Several affidavits were taken to show that he always considered the United States as his permanent place of residence, and that he uniformly expressed his determination to return. His letters manifested the same intention. It also appeared that his business was complicated, and required his attention after he ceased to engage in new adventures; but it did not appear that he had performed any act which could be considered as

commencing to return, until August 1813, when he engaged a passage on board the Robert Burns.

As to the 66 boxes of merchandize, the moiety of which was still claimed by Robert and James Thompson and William Steele, they prayed, on bringing up the cause to this Court, to be allowed to make further proof of their property in the said goods; and offered, as further proof, the affidavit of James Thompson that they were the joint property of the house of Dalgleish and Frame and of Messrs. Thompsons and Steele, under a contract made by two letters which were exhibited, and which he said were original. In addition to this, James Thompson swore that he gave his bill for the moiety of these goods, which bill he had paid, and that he was prevented from notifying this contract to his partners in his letter to them, by the hurry produced by the shipment. The Claimants offered, also, the affidavit of William Steele, stating that, some time after the papers of the ship Frances were opened, he received the invoice and letters annexed to his affidavit in an *envelope* with some other papers. That the letters were in the hand-writing of John Frame and James Thompson. That, before he received them, he was convinced, from the marks, that the goods in the invoice were, in some respects, the joint property of his house and of Dalgleish and Frame; which fact he stated to the agents of the captors as well as the judge of the Circuit Court, at the trial in June, 1813; and that James Thompson was in the habit of taking goods on joint account from houses in Scotland, and sending them to the house in America, without specifying whether they were on joint account or on commission.

The letters referred to, were, one from Dalgleish and Frame, dated Glasgow, 27th June, 1812, and addressed to Mr. James Thompson, Glasgow, in which they say the goods were printed in consequence of his orders; and express a hope that he will take the whole contained in the invoice; or, if not, that he will allow them to go to his house on joint account. The other was a letter addressed to Messrs. Dalgleish and Frame, signed James Thompson, and dated Glasgow, 1st July, 1812, in which he acknowledges the receipt of their letter of the 27th of June, 1812, and says, that as there are a

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great many more goods in the invoice than he had ordered, and as he did not wish to take so large a quantity, he would send them on joint account.

The invoice, or rather bill of parcels, is dated Glasgow, 27th of June, 1812, and was headed "Messrs. R. and J. Thompson and W. Steele bought of Dalgleish and Frame."

The affidavit of John Frame, taken in Glasgow, was also exhibited, in which he swears that the goods are the joint property of Messrs. R. and J. Thompson and Wm. Steele and of Dalgleish and Frame.

Such was the further proof offered.

In the Frances were two letters from James Thompson to Wm. Steele. The first was dated Glasgow, July 13th, 1812, in which he says "I annex a list of goods consigned by the Frances. These consignments are the safest and surest trade for us, and it was from this conviction that I allowed of so many consignments." In the annexed list of consignments, referred to in the foregoing letter, were the goods shipped by Messrs. Dalgleish and Frame. In this letter, he writes on the business of the house, speaks of the consignments generally, recommends that the goods should be promptly sold at the market price, and accounts of sales returned; but makes no allusion to any interest in the goods of Dalgleish and Frame.

IRVING, *for Appellants*, after stating the facts of the case, and the claim of Robert and James Thompson and William Steele, contended,

That British property shipped on board an American vessel, before a knowledge of the war, was not liable to capture, either under the laws of the United States or the president's instructions to the commanders of privateers. That the commissions issued by the president to the private armed vessels of the United States, only authorized them to seize, 1st. *British* vessels and the property found on board: 2d. All property liable to capture by the laws of war; and that the property, in the present case, did not come under either of these de-

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scriptions. *Acts of congress of June 18th, and June 26th, 1812, Laws U. S. vol. 11, p. 227 and 238.* See, also, *the instructions of the president to the private armed vessels of the United States.*

Enemies' property in possession of the nation declaring war, at the time of the declaration, is not liable to seizure as prize of war: it can only be sequestered by municipal regulation. The Court having jurisdiction in cases of this kind, sits as a municipal, not as a prize Court. *1 Rob. 238, The Rebeckah. 5 Rob. 207, The Boeders Lust. 2 Azuni, 224.*

The property, in the present case, is to be considered as committed to the public faith The circumstances under which it was shipped, and afterwards sailed, were very peculiar. The non intercourse act and the several acts supplementary thereto, the revocation of the French decrees, the president's proclamation of 2d November, 1810, the letter of the American secretary of state (Mr. Monroe) to Mr. Foster, the British minister, under date of July 26th, 1811, the revocation of the British orders in council, and the assurances of Mr. Russel, the American charge d'affaires in Great Britain, presented a state of things on which the British merchants, and the American merchants in Great Britain, confidently relied for the security of their property shipped, under these circumstances, to the United States.

This doctrine, that the property of an enemy, found in the country at the breaking out of a war, is under the safe-guard of the public faith, is a principle of the common law. In England, property in this situation would not be condemned. Enemy goods which came down the Baltic, and were landed in England before a knowledge of the war, have been there held to be safe. *Magna charta* itself recognizes the principle. By the rule of reciprocity, therefore, protection ought to be extended by the American government to the property now in dispute.

It is said that we have not a standing in Court, that James Thompson is an alien enemy, and that an alien enemy cannot support a claim of this kind. But we

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say that, admitting James Thompson to be an alien enemy, his agent in this country may have a standing in Court, if the property in question be divested of its hostile character, which we contend is the case here. 5 *Rob. Nostra Madonna delle Gracie.* 6 *Rob.* 1. *id.* 21, *The Marianne.* 2 *Rob.* 135, *The Packet de Bilboa.*

But if these goods be hostile property, and the Claimants, on that account, have no right to them, still, we contend, the *captors* cannot support their claim: The property of the goods, if not in the Claimants, is in the United States, and liable to seizure under the non-intercourse act of March 1, 1809; which act is neither repealed by nor merged in the act declaring war, nor any other act. *Laws U. S. vol. 9, p. 243. § 5, § 8, and § 18, of the act.* The 3d sect. of the prize act, (*Laws U. S. vol.* 11, *p.* 239,) requires that all the laws of the United States, then in force, be observed by the owners, officers and crews of privateers. The non-intercourse act was one of the laws of the United States then in force. The second set of instructions to the privateers of the United States, (issued 26th August, 1812,) interdicts the capture of American vessels having on board British goods: They are to be seized by the collectors of the respective ports. The United States have always asserted their prior right to such property. (See the circular letter from the comptroller of the treasury, of October 16th, 1812.) They have chosen to *municipalize* it—to reserve it to themselves Congress has resisted every attempt to the repeal the non-intercourse. The act of July 13th, 1813, (*Laws U. S. vol.* 12, *p.* 14,) shows that the United States have not relinquished their claim to property situated like that now in dispute. Their relinquishment only goes to such property as should be *condemned* as prize of war.

As to the first instructions of the president, they only authorize the private armed vessels of the United States to capture enemy property on board neutral or hostile vessels, and not that found on board American vessels returning to the United States, flying before the storm of war, and seeking the protection of their country. See the circular letter of Mr. secretary Gallatin, of 26th August, 1812. The second set of instructions, before referred to, prohibit the capture of American vessels returning to the United States with British property ship-

ped after the repeal of the orders in council, and before the declaration of war was known in England. These instructions were operative as soon as issued, and were the law for all the privateers of the United States. They made a cessation of hostilities as to the property above described; which if thereafter captured by a privateer, would be restored to the owners. The captors would only be relieved from the payment of damages and costs. 2 *Azuni*, 229, 230, 355, 263.—2 *Dallas*, 40. *Bain v. Schr. Speedwell.*—1 *Rob.* 154. *The Mentor.*

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We would now, on behalf of the Claimants, move the Court to allow us further proof as to the ownership of the property. We wish to show that the goods are not, in truth, consigned property, but that one moiety belongs to the Claimants. We wish to explain the papers which the captors have considered as proving the property in question to be hostile. That we have a right to make this explanation, we refer the Court to the following cases. 6 *Rob.* 3.—*id.* 132, *W. and J. Bells case.*—4 *Rob.* 161. *Maddonna delle Gracie.*—*id.* 21. *The Josephine.*—3 *Rob* 268. *The Sarah.*—That further proof may be allowed in an appellate Court, see 1 *Rob.* (Amer. Ed.) *p.* 7. *Sir W. Scott and sir J. Nicholl's statement of the general principles of proceeding in the admiralty.*

DEXTER, *contra*,

Said that the motion, on behalf of the Claimants. for further proof, was entirely unexpected—that there was nothing for them to found such a prayer upon—that the claim to the 130 packages was ambiguous, the ground upon which it was made being alternative, viz. *either* that the goods were shipped on joint account, *or* that the Claimants have an equitable lien on them, on account of advances made on the consignment.

That these 130 packages were wholly British property, is clear from the papers exhibited: they were consigned by British merchants to the Claimants, with orders to sell, and remit the proceeds.

The decision as to the residue of the property in dispute, viz. the *third* claimed by James Thompson, depends upon his national character. That this is hostile is evi-

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dent from the decision in the case of the Venus (*ante p.* 253,) to which decision, and the argument on behalf of the captors in that case, we beg leave to refer the Court.

To return, then, to the 130 packages. It being clear that they were British property, the only question is, whether such property is liable to condemnation, as prize of war.

The case, as stated and argued upon by the captors, is not justified by the facts; the real state of the case is materially different. The Frances was captured, not in port, but *on the high seas.* She did not enter the port upon the faith of the nation, but was brought in as prize.

The counsel for the Claimants, admitting the goods now in dispute, to be British property, has said that American property similarly situated would not be condemned in England; and that therefore, by the rule of reciprocity, protection ought to be extended by the American government to these goods. But even the rule of reciprocity, if it were one which this Court could enforce, would not avail the Claimants in the present case; for the British Government do not themselves respect the rule: They have captured and condemned our vessels sailing towards England, though ignorant of the war.

The declaration of war is expressed in terms as general as possible. The instructions of the president to the privateers of the United States give them a general authority to capture all property liable to capture by the laws of war.

The public faith was not pledged so as to protect this vessel. If it was pledged to repeal the non-intercourse law, there was no pledge that war should not be declared; and we claim condemnation under the declaration of war.

As to the president's instructions of 26th August, it appears that they were issued only two days previous to the capture of the Frances. The captors, consequently, had no notice of their existence. They sailed with instructions authorizing this capture: and we contend

that the new instructions were no instructions to these captors, until they had received notice of their being in force.

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It has been said, on the part of the Appellants, that if their claim is rejected, the United States, and not the captors, will be entitled to the property. We reply that the United States have now abandoned their claim; so that the property, if condemned, must be condemned to the captors.

HARPER, *for Appellants.*

The reasons on which we ground our prayer for further proof, are the following.

1st. Certain bales of carpeting appear, by the invoice and bill of lading, to be the property of Steele. In the letter of 13th July, 1812, from James Thompson to Steele, they are stated to be a consignment. The further proof which we would offer, in regard to this apparent inconsistency, goes to show that upon these goods, although stated to be consigned to Steele, James Thompson & Co. had made advances to the owners, to the amount of 1000*l.* sterling, which created a lien upon the goods. This lien, we contend, was the property of James Thompson & Co. Again, certain other goods appear, in like manner, by the bill of lading and invoice, to be the property of Steele; but, by the letter, to be the property of Dalgleish and Frame and James Thompson. The further proof we offer here, is, that we were joint owners with Dalgleish and Frame.

It is a general rule of prize law, that further proof shall be allowed on an appeal, where the preparatory evidence was doubtful or ambiguous. The present case, we conceive, comes within this rule.

DEXTER, *contra.*

On this point of further proof, *cited* the two following cases. 6 *Rob.* 24, (Amer. Ed.) *The Marianna*—to show that an equitable lien is no ground of restitution in prize causes—and 5 *Rob.* 196. *The Tobago*, where it is decided that a bottomry bond given in time of peace, gives

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no such title to the obligee as will enable him to support a claim for restitution after a declaration of war. He contended that a captor takes *cum onere*, only when the *onus* is visible and direct.

PINKNEY, *same side.*

Further proof, under the circumstances of this case, ought not to be allowed. The goods were shipped when war was expected. The intention of the shipper was to give a neutral character to the property. James Thompson knew the facts relative to the transaction as well when he made the shipment, as now. He had reason to expect and did expect war: Hence the color given to the transaction. If the Court allows further proof in a case like this, they will hereafter be inundated with fraud and perjury. It is a general rule of the prize Courts, that further proof which goes to contradict the ship's papers, shall not be admitted. If there had been really an American interest in this case, it was James Thompson's duty as well as interest to let it appear upon the ship's papers. The original claim, of the Appellants was stated in the alternative—*either* they had a lien on the goods for money advanced by them through James Thompson, *or* the goods were consigned to them on joint account.

The heading of the invoices was false, by their own admission. A letter appears among the papers in this cause, from Robert Sterling, junr. who had property on board, shipped in the name of Wm. Steele: this letter was evidently written in contemplation of war. James Thompson's letter of 13th July, contains a list of goods *consigned*, in contradistinction to the goods belonging to the firm. The goods in question are among the *consignments*. By James Thompson's letter of 14th July, it appears that he knew of the war. From a second letter of Robert Sterling, junr. dated 15th July, it is evident that he also knew of the war. In contradiction to such documents, further proof ought not to be admitted.

HARPER, *in reply.*

In the cases of the bottomry bond and the lien, cited by the counsel on the opposite side, the possession of the

property was in the captors. The lien was a lien without possession, it was only an incumbrance, But here, the thing was in possession of him who had the lien: The property was vested, so far as the lien extended for the advances. Steele was Thompson's agent, and might have retained the goods until the advances were repaid.

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Although war was feared, peace was confidently expected. There was no motive for giving a neutral character to the property. No fraud was intended. There was no intention to defeat the non-intercourse law. Besides, an intent, even if it existed, to defeat a municipal law, is no ground for refusing further proof.

The letters referred to by the counsel for the captors, went with the invoices; and the accidental ambiguity which seems to exist in the papers was owing to the hurry occasioned by the endeavor to get the goods first to market, and to obtain the bounty on exportation.

DEXTER. In the cases cited, the property was not more in the belligerent captor, than it was in the present case:—These goods never were in possession of the consignee;—They were captured in the hands of the shipper:—They were not shipped as the property of James Thompson & Co. but as the property of the Scotch merchants.

IRVING, cited 1 *Rob.* 86. *The Bernon*, on the point of further proof.

Monday, March 7th.

IRVING. As to the national character of James Thompson. It appears, from the testimony in this case, that James Thompson is a native of Scotland, that he came to the United States in 1793, was naturalized in 1797, and, in 1801, returned to Scotland where he continued to reside as a merchant, till some time subsequent to the declaration of war.

Naturalization, under the laws of the United States, confers upon the subject of it all the rights and privileges of a native citizen, excepting that of becoming president of the United States. He has, therefore, the

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same right to leave this country and go abroad which a native citizen possesses. The law of England is the same in this respect. When is the hostile character to be fixed upon him? Not until a war breaks out between the two countries, and he continues, notwithstanding, to reside and carry on a hostile trade with the enemy country. 2 *Cranch*, 120, *Murray v. The Charming Betsy*. A citizen, whether native or naturalized, surprised in a foreign country by a war, has a right to a reasonable time to withdraw his effects. 4 *Rob.* 161, 195. *Madonna delle Gracie*. In Mr. *Johnson's* case (1 *Rob.* 17, 12, *The Indian Chief*) his engagements to his creditors were considered by the Court as a sufficient justification of his residence in Great Britain, and his property was restored. On the point of reasonable time to withdraw, see 5 *Rob.* 90, *The Ocean*. 1 *Rob.* 165, 196, *The Hoop*. 4 *Rob.* 191, 232, *The Dree Gebroeders*. *Vattel, B.* 3, *ch.* 4, § 63.,

Expectation of peace justifies delay in an enemy country, or explains the *quo animo* of the resident. 5 *Rob.* 60, *The Diana*.

In *Bell v. Gilson*, 1 *Bos. and Pul.* 355, it is decided that the goods of a British subject purchased in an enemy's country after the commencement of hostilities, may, under certain circumstances, be sent to England. This decision, though now over-ruled in that country, in the case of *Potts v. Bell*, 8 *T. R.* 548, has not been overruled here.

The liberty to withdraw property in case of war, is expressly recognized by various treaties, which *fix the time* for withdrawing. See, among others, *the treaty of* 1794, *between his Britannic majesty and the United States, art.* 26. But these treaties do not create the principle.

If, then, we allow time to an *enemy* to withdraw his effects, shall we not allow at least the same indulgence to our own citizens?

A cruizer cannot capture for violation of a municipal law. The seizure for a violation of the non-intercourse

act is directed to be by the collectors; the action for the recovery of the penalties and forfeitures arising under the act is to be *debt*, and the proceedings generally are to be in conformity with the act of 2d March, 1799, to regulate the collection of duties on imports and tonnage. But where a statute gives a particular form of action, that form must be pursued. *Act of congress of March 1st, 1809, § 8, and 18. (Laws U. S. vol. 9, p. 248. 254.) Act of March 2d, 1799, § 67. 68, 69, 88, 91. (Laws U. S. vol. 4. p. 389, 390, 427, 431. Bac. Abr. vol. 4, p. 654, tit. Statute, K.*

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*Saturday, March 12th. Absent....*LIVINGSTON, *J.*

MARSHALL, *Ch. J.* after stating the facts of the case, delivered the opinion of the Court as follows:

The rights of James Thompson depend entirely on his national commercial character; which is decided by the opinion given in the case of the Venus, *(ante p. 253.)*

The sentence of condemnation pronounced in the Circuit Court, as to James Thompson's claim, is affirmed.

The original evidence is very strong to prove that the shipment made by Dalgleish and Frame was entirely a *consignment*. The whole letter of the 13th of July confirms this idea. It is scarcely credible that the property of Dalgleish and Frame would have been placed on the list of consignments without a note upon it, had it been shipped on joint account. The hurry of business will not excuse or account for this omission. The proposition of Dalgleish and Frame is stated to have been made on the 27th of June, and to have been accepted on the 1st of July. The letters of Thompson to Steele are written on the 13th and 17th of July, when this shipment is treated as being altogether a consignment. The hurry could not have been such as to account for a mis-statement of the fact. There is, too, something mysterious in the manner in which the papers, offered as additional proof, reached Mr. Steele. That they should not have been accompanied by a letter, nor bear any marks of coming from abroad, is singular.

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Further proof is not admitted, and the sentence is affirmed.

Wednesday, March 16th. *Absent*....MARSHALL, *Ch. J.*

WASHINGTON, *J.* as to the opinion of the Court on the question of *lien*, referred to the opinion delivered in the case of *the Frances, (Irvin's claim, post. p.*) which he said was precisely within the principle of the present case.

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(Graham's claim.)

Where the affidavits produced on the order for further proof are positive—but their credibility impaired by the non-production of letters mentioned in the affidavits, a second order for further proof will be allowed in the appellate Court.

THIS case like the preceding, was an appeal from the district Court of Rhode Island: and the claim of John Graham, the Appellant, was to certain other goods by the same ship, the Frances, captured and carried into Rhode Island, as stated in the case referred to, by the Yankee privateer.

HARPER, *for Claimant.*

PINKNEY *and* DEXTER, *for the Captors.*

The material facts of the case, and the substance of the argument on both sides, are stated in the following opinion of the Court,* delivered *March 12th*, by

MARSHALL, *Ch. J.*

John Graham, a merchant of New York, claimed sundry parcels of goods shipped on board the Frances, as his sole property.

The goods were shipped by William Graham and brothers, merchants of Glasgow, on account and risk of John Graham, merchant, of New York. There are

* LIVINGSTON, J. was absent when this opinion was delivered.

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two bills of lading, each filled up with the name of John Graham. There are also two invoices, each headed with the name of William Graham and brothers as shippers, and stating the goods to be shipped on account and risk of John Graham. The first of these invoices is marked in the margin thus, W. G. ⋈ I. P. and the other thus, [G.] There were also two lists of goods. The first headed, "List of goods shipped by the Frances, for Messrs. John Graham & Co. New York." This list is marked W. G. ⋈ I. P. The other is headed, "List of goods shipped by the Frances, for Messrs. Peter Graham & Co. Philadelphia." These goods are accompanied by two letters dated the 15th and 16th of July, signed William Graham and brothers, the first addressed to Messrs. John Graham & Co. and the last to Messrs. Peter Graham & Co. The letter to John Graham & Co. treats of their trade generally, and contains only the following allusion to this shipment: "You "have herewith the ship Fanny's accounts, to which "refer—also invoice of sundry goods per Frances— "we hope they may go to a good market. We expect "you will have about one hundred packages of English "goods. There will be somewhat more to Philadelphia."

The letter to Peter Graham & Co. is also a general letter on the subject of their trade. It contains the following passage respecting the shipments by the Frances: "We have shipped by Frances a few goods well "selected—we could not get almost any cluster seeds."

The Circuit Judge directed the cause to stand for further proof.

It appears from the affidavit of John Graham, that in the month of January, in the year 1809, he entered into a limited partnership with his brothers, William Graham and Peter Graham, who, as well as himself, are naturalized citizens of the United States. The business was to be conducted at New York by himself, under the name of John Graham & Co.—at Philadelphia, by Peter Graham, under the name of Peter Graham & Co.—and at Glasgow, by William Graham, under the name of William Graham and brothers. That, from the commencement of the partnership, he has been in the constant habit of carrying on extensive

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business, with the knowledge of his partners, on his private account, and also in connexion with others. That the investment and disposal of the funds of the deponent, together with the management of the mercantile concerns of the firms composed as aforesaid, and the commission business, were the principal if not the sole business of William Graham and brothers at Glasgow. That, from the intimate knowlede they possessed of each others affairs, and in consequence of their connexion as brothers, the distinction between his firm and his private character was not always preserved. It was the less attended to, because the affairs of the company and his individual concerns were frequently the subjects of the same letter, and it became the more usual to address him by the style of the firm, because there are several other persons of the same name in New York. He adds, that in making shipments on the sole account of the deponent, William Graham has been in the habit of assorting the whole into invoices of small quantities, calculated to suit the generality of purchasers in the New York market, and also that the goods in any one of the said invoices might be sold entire, or transshipped to Philadelphia or any other market, with the original invoice accompanying the same, as such original invoice would inspire more confidence in the buyers. This circumstance occasioned the lists of property shipped by the Frances, and one of them to be addressed to Peter Graham and Co. He swears in the most positive and precise terms, that the property is entirely his own, and was purchased with his private funds in the hands of William Graham.

William Black deposes, that he has been long and intimately acquainted with John Graham, who is a man of fortune and character, and has been in the habit of transacting much of his own business in the said Graham's counting house: That, from his knowledge of the affairs of the said Graham, he verily believes that the said Graham, both before and since the war, has been in the habit of doing business on his private account, and has received many shipments in which neither of his brothers were interested. He has been concerned with the deponent as part owner of vessels in which the deponent believes that neither William nor Peter Graham held any share.

Isaac Belt and David Dunham, merchants of New York, swear to facts similar to those stated by William Black.

Charles Graham, of a different family from the Claimant, swears that in the year 1811, there were, according to the dispensary, six persons of the name of John Graham in New York, one of whom was the deponents father; and that mistakes were frequently made respecting each other's letters which came through the post-office.

William Hill, principal clerk of William Graham and brothers, deposes to the different concerns and to the nature of the business transacted by William Graham and brothers, as stated in the affidavit of John Graham. That they had under their care ships and vessels in which John Graham alone was interested. That since an early period in the year 1811, the concern of William Graham and brothers have not shipped any goods whatever, for or on account of the said co-partnership, to either of their said establishments, or in any other manner whatsoever. That vessels continued to arrive, particularly the Trident, the Fanny, and the Cuba, to the charge of the said William Graham and brothers, for the account and risk of John Graham, in which ships and cargoes the said co-partnership or the said William Graham had no share or interest whatsoever. The deponent has seen sundry letters from the said John Graham to the said William Graham and brothers, to invest the monies arising from the freight and cargoes of those ships, in goods, in behalf of him, the said John Graham, so soon as the British orders in council should be revoked; and, until then, to place the amount to his private credit in the books of William Graham and brothers, which was done by the deponent as clerk. That this money was invested in the goods shipped by the Frances and other vessels, which were shipped on the sole account of John Graham, and were so entered on the books, by the instructions of William Graham. He states the practice of dividing shipments into small invoices, as is stated in the affidavit of John Graham.

Peter Graham swears that he has not, and never had, any interest in the goods shipped by the Frances. That

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John Graham has been in the habit of transacting business on his own account, with the knowledge of his partners, and has frequently consigned his separate goods to Peter Graham & Co.

William N. Steele, clerk of Peter Graham, deposes to the same facts; and founds his belief that Peter Graham had no interest in the goods shipped by the Frances, on his knowledge of the business of the house.

William Graham states in detail, with great explicitness, the circumstances narrated in the affidavits of John Graham and of William Hill, his principal clerk, and avers most solemnly that the goods shipped by the Frances were the sole property of John Graham.

The Court below directed restitution of two thirds of the cargo, as being the property of John and Peter Graham, and condemned one third, as being the property of William Graham. From this sentence of condemnation John Graham has appealed; and from so much of the sentence as directs a restitution of one third as the property of Peter Graham, the captors have appealed.

It is certainly a rule in prize Courts dictated by good sense, and calculated to promote the purposes of justice, that letters accompanying the cargo, written in good faith, in the prosecution of a fair and honest business, should have great influence in ascertaining the real proprietors of it. The letters on board the Frances are of this description. They are such as would be written if the goods were really the property of the company; but such as could scarcely have been written if the goods were the sole property of John Graham. Had they been his sole property, it must have happened that some expression would have been found in the letters indicating the fact. Men who write carelessly and without design, may not be very explicit; but it rarely happens that they entirely conceal the truth. There will be some allusion to it.

If the goods were the sole property of John Graham, why address a letter to Peter Graham & Co.? The affidavits account rationally enough for making up separate invoices; but addressing a letter to Peter Graham

& Co. at Philadelphia, by a vessel destined for New York, has very much the appearance of a shipment destined for the company at that place, and not for John Graham, of New York. The expressions of that letter favor the same idea. "We have shipped you, by Frances, a few goods well selected." These cannot well be the goods of John Graham. The language is surely not such as would be used in that state of things. "We could not get almost any cluster seeds." These expressions have a necessary reference to some letter of orders from Peter Graham, mentioning cluster seeds among the articles directed to be shipped.

The affidavits produced on the order for further proof, are too positive to be disregarded without considerable reluctance and hesitation. There are, however, certain rules of evidence, the authority of which is admitted in all Courts. One of these is, that if a written paper be referred to, which paper is in the power of the party, it ought to be produced. The affidavits of William Graham and of William Hill state expressly that letters had been received from John Graham, directing the disposition of cargoes shipped from America on his own account, and ordering the proceeds to be invested in British manufactures, also on his own account, so soon as the British orders in council should be repealed. Why are not these letters produced? It is impossible not to perceive their necessity. Mr. John Graham must have copied these letters into his letter book. Why has he not furnished some evidence of this fact. His letters must have been answered by William Graham more explicitly than in that which was found on board the Frances. Why is no one of those letters produced? It is impossible to account for the fact that no one of these letters is an exhibit in the cause. The Court feels itself bound, judging on this evidence according to the rules of law, to consider the goods as the property of the company. But it is urged, on the part of the Claimant, that if permitted to give further proof, he will produce the correspondence and such other proof as will be entirely satisfactory to the Court. Several circumstances exist in this cause to induce the Court to allow still further time for the production of such further evidence as may place the transaction beyond any doubt. The cause is ordered to stand for further proof.

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(Dunham and Randolph's claim.)

A case of further proof. Goods, shipped by a British to an American house (partly in conformity with orders, and partly without orders,) who had an option to accept or reject the whole invoice in a limited time, remain the property of the shippers until the election be made to accept them.

THIS is another case of goods by the Frances, captured by the Yankee, and condemned in the Circuit Court of Rhode Island, brought up to this Court on appeal.

Messrs. Dunham and Randolph, merchants of New York, claimed three bales and nineteen boxes of goods shipped by Alexander Thompson of Glasgow, a British subject, and consigned to Dunham and Randolph. The bill of lading is in their names, and the invoice purports to be on their account and risk. A letter from Thompson to Dunham and Randolph, dated Glasgow, 11th July, 1812, after describing the goods, and the labor he had employed in the business, and stating that the goods were sent partly in the Fanny and partly in the Frances, says, "I have exceeded in some articles, and have sent "you others not ordered." "I leave it with yourselves "to take the whole of the two shipments, or none at all, "just as you please. If you do not wish them, I will "thank you to hand the invoices and letters over to "Messrs. Falconer & Co. I think twenty-four hours "will allow you ample opportunity for you to make up "your minds on this point; and if you do not hand them "over within that time, I will of course, consider that "you take the whole."

On the 15th of July, Alexander Thompson again wrote to Dunham and Randolph a letter in which he mentions the information that a bill declaring war had passed the house of representatives. He then adds, "considering "the circumstances of the times, I thought it best to in- "form Messrs. Falconer, Jackson & Co. fully of the "conditions on which I have shipped you the goods by "the Fanny and Frances."

In a letter to Messrs. Falconer, Jackson & Co. of the same date, he explains, in full, the proposition he had made to Dunham and Randolph, and directs how those gentlemen are to act for him, should Dunham and Randolph reject the consignment.

This property was condemned in the Courts below, and from the sentence of condemnation the Claimants appealed to this Court.

PINKNEY, *for the Appellants.*

This is a mere question of fact as to property. Were or were not the goods the property of the enemy? We contend, that they were not. All the documentary evidence shows the property to belong to Dunham and Randolph. The condition mentioned in Thompson's letter of 11th July, was a condition *subsequent.* The property vested in the Claimants, liable to be divested, if rejected by them within twenty-fours after receiving the letter.

The greater part of the goods, if not the whole, was shipped by order of the Claimants, long before the sailing of the vessel. The delivery to the master of the ship was an execution of the order. The shipper had no longer any control over the property, except, in case of the insolvency of the consignees, in which event he might stop it *in transitu.*

Every circumstance connected with the transaction appears to be perfectly fair; and if the evidence now before the Court is not sufficient to support the claim of the Appellants, it is a case for further proof. The Claimants had accepted the shipment by the Fanny before the capture of the Frances, and thereby rendered certain what was before optional. They thereby bound themselves to to take the shipment by the Frances.

HUNTER, *contra.*

The goods in question were not shipped according to order, as appears by Thompson's letter of 11th July. They belonged to the shipper until the consignees had elected to take them; and they could not make their election before the arrival of the Frances.

At whose risk were the goods while at sea? Thompson had no power to impose the risk on the Claimants. If the goods had arrived at Boston, they might have been attached as the property of the shipper. If attach-

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ed as the property of the Claimants, they might have said the goods were not their property: or if they had been sued as garnishees of Thompson, they might have said they owed him nothing. They were not bound to accept the goods.

If the property, *at law*, belonged to Thompson, *a fortiori* in a case of prize. It is a rule of prize Courts that, in time of war, no future election shall be allowed to change the right of property at sea—*in transitu*. The question is, in whom is the legal estate? At whose risk were the goods passing at the time of capture? 2 *Rob.* 111, 133. *The Packet de Bilboa.*—1 *Rob.* 90, 107. *The Danckebaar Africaan.*—5 *Rob.* 115, 128. *The Jan Frederick.*—1 *Rob.* 283, 336. *The Vrouw Margaretha.*—4 *Rob.* 21, 25. *The Josephine.*—*id.* 180, 218. *The Aurora.*—*id.* 170, 207. *The Carl Walter.*—6 *Rob.* 337. *The Carolina.*—1 *Rob.* 243. 289. *The Copenhagen.*—These cases all go to prove that, during war, property cannot change *in transitu*.

DEXTER, *same side.*

In this case, there was no contract to change the property. To constitute a contract, the assent of both parties is necessary. The goods were not shipped according to the order of the Claimants, and a condition was annexed. The property never vested in the Claimants: It was only to vest in them on condition that they failed to deliver over the goods to Messrs. Falconer & Co.

PINKNEY, *in reply.*

The further proof which the Claimants would offer, will show that almost all the excess of goods beyond the order, was on board the Fanny. Here was a direct assignment to the Claimants. The goods were delivered to their agent, the master of the vessel. The documents were all sent to the consignees. No change of property *in transitu* was necessary. The property was already vested in the Claimants: and, upon its arrival, they might have asserted their right to it. So far as the goods comported with the order, the contract was

certainly executed: There can be no doubt about *those* goods. The Claimants might have maintained trover or replevin for them.

This was not the sort of shipment described by *sir W. Scott*, in the cases cited. Thompson, the shipper, was a naturalized citizen of the United States: This appears in other cases before this Court; and that fact constitutes part of the further proof which we wish to introduce. There was no knowledge of the war, in this case. The transaction was not shaped by the expectation of war. Thompson did not believe that war would take place, and he gives his reasons. The shipment was directed on the 11th of July. Between that and the 15th, the intelligence of the war was received.

*Saturday March 12th. Absent....*LIVINGSTON, *J.*

MARSHALL, *Ch. J.* after stating the facts of the case, delivered the opinion of the Court as follows.

It has been argued for the Appellants, that, by the invoice and bill of lading, and the true construction of the letter of Alexander Thompson, the property was vested in Dunham and Randolph, liable to be divested by their rejecting the consignment within twenty-four hours after receiving the letters. That the condition annexed to the transfer, is subsequent, not precedent.

The Court cannot concur in this reasoning. It has been very truly urged for the captors, that to vest this property in Dunham and Randolph, a contract is necessary; and that to form a contract, the consent of two parties is indispensable. In this case, no such contract appears. Had Thompson, in execution of the orders of Dunham and Randolph, consigned to them, unconditionally, such goods as they had directed, the contract would have been complete; and the goods would, on being shipped, have become the property of Dunham and Randolph. But Thompson has not done this. With the goods which were ordered he has consigned other goods, expressly stipulating that Dunham and Randolph shall not take the goods they had ordered, unless they consent to take the whole quantity put on board both vessels. This, then, is a new proposition, on which Dunham and Ran-

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dolph are at liberty to exercise their discretion. They may accept or reject it; and until they do accept it, the property must remain in Thompson. The sentence of condemnation, therefore, in this case, was warranted by the evidence before the Circuit Court.

But the Claimants pray an order for further proof; and say, that, before the capture of the Frances, the Fanny had arrived, and Dunham and Randolph had consented to take both cargoes.

This application is opposed on the principle that, were the fact even true, as alleged by the Claimants, belligerent property cannot change its character *in transitu*.

Reserving any opinion on the law of the case, until the facts alleged shall be substantiated, if it shall be in the power of the Claimants to substantiate them, the cause is ordered to stand for further proof.

THE FRANCES, BOYER, MASTER.

(Kennedy's claim.)

Question of fact as to property.

THIS was likewise a case of goods by the *Frances*, condemned in the Circuit Court of Rhode Island. They were claimed by Duncan Kennedy, an American citizen, who appealed to this Court.

The case was submitted to the Court without argument.

Saturday, March 12th. Absent....LIVINGSTON, *J.*

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

Duncan Kennedy, surviving partner of the house of George Stayley & Co. merchants of New York, claims eight boxes of merchandize, part of the cargo of the ship Frances, as his property.

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The invoice is headed

"*Glasgow, 8th July*, 1812.

"Messrs. George Stayley & Co.

"Receive from James Smith."

A letter from James Smith to George Stayley & Co. in speaking of the goods, terms them "*our goods*," and does not, in any manner, indicate that they are the goods of Stayley & Co. He concludes his letter with saying, "As it is to be hoped the trade will now open, "I shall expect your instructions saying what goods "are best suited for the market."

The bill of lading is filled up with the name of George Stayley & Co. "*on account and risk as per invoice.*"

There are several letters from George Stayley, in Glasgow, to his father; but none of them indicate an opinion that the property of the goods was in George Stayley & Co:

The sentence, condemning these goods, must be affirmed.

THE FRANCES, BOYER, MASTER.

(French's claim.)

An intention, clearly proved, of a consignor of goods to vest the right of property in the consignee, is not sufficient to effect such a change of property, until the goods are received by the

THIS, like the former cases of the *Frances*, was an appeal from the United States' Circuit Court for the Rhode Island district.

William French, the Appellant, a citizen of the United States, claimed fourteen boxes of merchandize shipped on board the Frances by James Auchincloss, of Paisley, in Scotland, to A. and J. Auchincloss of New York, on their account and risk, with orders to remit the proceeds to the shipper for payment. The Clai-

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mant alleged that the goods had been previously ordered by him through A. and J. Auchincloss, to be imported on his account and risk.

Further proof was ordered by the Court below, to consist of the original order for the merchandize, and all the letters and correspondence relating to it, and of all the proofs of property in the Claimant.

consignee, or some evidence is given of his agreement to take them on his own account: until that time, the goods are at the risk of the shippers; and if they are enemies, the goods, if captured, are good prize. No difference though the consignee were the agent of a third person who had directed him to order the goods, unless it appears that he actually did order them.

Under this order, the Claimant produced a letter dated Baltimore, 20th February, 1812, signed by himself, and addressed to A. and J. Auchincloss, requesting them to order from their friends in Scotland, goods not exceeding in value 1,000*l.* sterling, to be shipped as soon as the orders in council should be revoked.

On the 20th of September, 1812, A. and J. Auchincloss wrote a letter to the Claimant, advising him of the capture of the Frances with the goods, said to be shipped on his account, to their address, and desiring him to take the necessary steps to have his property cleared.

To these letters were added affidavits of the Claimant, tending to prove the property in him, together with an affidavit of Darius Hodson, that he forwarded the above last mentioned letter to the Claimant at Providence, by his request; and that, when he took it from the file, it was a whole sheet directed to the Claimant from New York, by J. Auchincloss, jun.; but that, in order to save postage, he, the deponent, tore off the outside leaf, not thinking, at the time, of its being of any importance.

Upon this proof, the claim was rejected in the Court below, and the property condemned to the captors.

In this Court the cause was argued by JONES for the Appellant, and DEXTER for the captors; and on

*Tuesday, the 15th of March. Absent....*MARSHALL, *Ch. J.*

WASHINGTON, *J.* delivered the following opinion of the Court:

This is the claim of William French to a part of the cargo of the Frances, shipped by James Auchincloss, of Paisley, in Great Britain, to A. and J. Auchincloss, of New York, on their account and risk. By the correspondence between the consignor and consignees, which was exhibited to the Court below, under an order for further proof, it is somewhat doubtful whether these goods were to be sold as the property of the consignor, or of the consignees. In the letter from the former to A. Auchincloss, dated the 17th of July, 1812, he says, "You will lose no time to transmit immediately, on the "receipt of the invoice by the Fanny as well as by the "Frances, to the full amount of the invoices; as there-"by, and no other way, is your credit and John's to be "restored here. Also remit, as I have often told you, "to clear off your old debt; and, for God's sake, let us "have no more failing in the family. You will observe "that the goods per Fanny and Frances are principal-"ly bought upon a credit of 3, 4 and 5 months—this "the consequence of failing."

In another letter of the same date, from the same to the same, he says, "By this ship, the Frances, I have "shipped you 14 boxes of different kinds of goods, "which I beg you will lose no time to dispose, as by "early remittances you will undoubtedly strengthen "your credit." In another part of this letter he says, "I beg you will lose no time to remit largely, say 3 or "4,000 pounds. Remember the old cash account with "the Paisley Banking Company." These letters, so far as they throw light upon this transaction, intimate very strongly that A. and J. Auchincloss were to dispose of these goods upon their own account, and as the purchasers of them. But to produce a change of property from the shipper to the consignee, it was essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell, and the other to buy. Had the language of these letters been more explicit than it is to prove that the intention of the consignor was to vest the right of property in the consignee, it would not have been sufficient to effect such a change, until the goods were received, or some evidence given of the agreement of the consignee to take them on his own account. No order from A. and J. Auchincloss to the

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consignor of this cargo, authorizing the shipment of it, was produced or offered to be produced in the Court below; and this Court, therefore, is warranted in believing that none such was ever given. Indeed, no interest whatever in these goods is asserted to have existed in A. and J. Auchincloss, but the same is claimed by Wm. French, a citizen of the United States, who, under the order for further proof, produced, in support of his claim, a letter from himself to A. and J. Auchincloss, dated the 20th February, 1812, in which he requests them to order from his friends in Scotland, a quantity of goods enumerated in the letter not to exceed 1,000*l.* sterling, to be shipped as soon as the orders in council should be revoked, and adding that he should consider the goods at his risk from the time they should be shipped; also an invoice of these goods sent by A. and J. Auchincloss to Wm. French, together with a letter from them, dated the 20th of September, 1812, advising him of the capture of the Frances with the goods shipped on his account, and recommending it to him to take the necessary steps to vindicate his right to the property. This letter made its appearance in the Court below, with the outer leaf, on which the post-mark would have been placed, had there been any, torn off. To do away the suspicion which this circumstance might well excite, the affidavit of Darius Hodson was produced, in which he states that he forwarded this letter to the Claimant, at Providence, having first torn off the outer leaf with a view to lessen the rate of postage.

The affidavit of the Claimant is added, which is fully to the purpose of supporting his interest in these goods, so far as his order to A. and J. Auchincloss can vest such an interest in him. But passing over those observations which might fairly be made upon the mutilated state of the letter from A. and J. Auchincloss to the Claimant, and the suspicious manner in which that circumstance is attempted to be explained, it may be observed that the claim of Wm. French is in no respect stronger than if it had been made by A. and J. Auchincloss. Admit that he wrote to A. and J. Auchincloss the letter of the 20th of February, 1812, and received from them that of the 20th of September, the inquiry still remains to be answered, where is the order for this

shipment from A. and J. Auchincloss as the agent of the Claimant?

The truth is, that in whatever light this question is viewed, these goods were at the risk of the shippers until they should be received by the consignee; and, consequently, were, by the capture, made good prize, as property belonging to the enemy.

THE FRANCES, BOYER, MASTER.

(Gillespie's claim.)

THIS, also, was an appeal from the sentence of the Rhode Island Circuit Court condemning certain goods captured on board the *Frances*, by the Yankee privateer.

The commercial domicil of a merchant at the time of the capture of his goods, determines the character of those goods, hostile or neutral.

These goods were shipped by Colin Gillespie, the Claimant, who had been naturalized in the United States, and consigned to Archibald Bryce and Alexander Muirhead, for sale and remittance to the shipper at Glasgow.

To ascertain the national character of the Claimant, further proof was ordered by the Court below, calling upon him to show how long, after his naturalization, he resided in the United States, before he went to Great Britain; how long he had since resided in the United States, at any time or times; how long in Great Britain; what was the nature of his business in the latter country; and in whom the property vested at the time it was shipped.

Upon the production of this further proof, it appeared that the property was vested in the Claimant at the time of its being shipped; that he was a native of Great Britain; that he emigrated to the United States in 1793; was naturalized in 1798; having, in the interim, returned to his native country on mercantile business in 1794 and 1796, and re-visited the United States in 1795 and 1797; that he again returned to his native country in 1799, was there married and re-visited the United

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States with his wife, in the same year; that he continued to reside in New York until June, 1802, when he once more returned to Great Britain, and resided there until November, 1805, when he came to the United States, (Mrs. Gillespie having died in Scotland) formed a partnership with John Graham, of New York, and returned to Glasgow in the same year, where he carried on the business of the partnership under the firm of Colin Gillespie & Co.; that he remained there until the partnership was dissolved, and until the 2d of July, 1813; on which day he left the enemy's country, and arrived in the United States with his family, in October, 1813; that he kept house at Glasgow, and built a ware-house there, which he still owns, and kept his counting house therein. He formed a determination to return to the United States, as he deposes, on being informed of the declaration of war by the United States against Great Britain, which took place on the 18th of June, 1812, and was known in England about the 20th of July following, but was prevented, by his engagements and commercial concerns, from carrying that intention into effect until the period above mentioned, still leaving some of his affairs unarranged.

Upon this evidence, the property was condemned in the Circuit Court; and an appeal was taken, by the Claimant, to this Court, where the cause was argued by JONES, HARPER, and DEXTER, for the Claimant; and FINKNEY for the captors.

JONES, *for the Claimant.*

The goods in question were purchased early in July, 1812, they were shipped on the 14th of that month, at which time the declaration of war was not known in England. It does not appear that the Claimant shipped any other goods than those in question. In less than a year after he had received information of the war, he returned to the United States with his family, thereby giving unequivocal evidence of the *quo animo* of his residence in Great Britain. In such a case, even the property of a neutral would be protected; *a fortiori*, ought the property of one of our own citizens to receive protection. Cases of this kind are analogous to cases of confiscation. If there be any particular period at which

we can consider this property as assuming a hostile character, it must be that, at which it would have been confiscable by the enemy, supposing the party to continue an American citizen. Had that period arrived? Were the circumstances such as would have justified Great Britain in confiscating this property? If not, surely the United States ought not to condemn it. *Vattel, B.* 3, *sec.* 63.

This case may be considered in another point of view, viz: whether the case of a naturalized citizen returning to his native country, and carrying on trade, as in the present case, is distinguishable in its consequences, in the event of war, from that of a *native* citizen going to a foreign country and engaging in trade. We contend that it is not. One authority, and one only, seems to favor the distinction; and that is the case of *La Virginia*, 5 *Rob.* 99. But in that case, it does not appear that the American character of Mr. *Lapierre* was acquired by naturalization. It might and very probably did depend on *domicil* alone. We contend that a person naturalized in this country, is as much a citizen of the United States, to all the intents and purposes of the present case, as a native. The naturalization law of the United States requires of the applicant for the privileges of naturalization, unqualified abjuration of allegiance to his former sovereign. The law of England on the subject goes to an equal extent. Naturalized and native subjects are looked upon as the same, to all legal purposes. 4 *Cranch*, 321. *Dawson's Lessee v. Godfrey.*

A *denizen* may be made such for life or in tail; "but one cannot be *naturalized* either with limitation, for life or in tail, or upon condition; for that is against the absoluteness, purity and indebility of natural allegiance." *Co. Lit.* 129, (*a.*) 2 *Domat*, 376.

If, according to the doctrine of perpetual allegiance, on the return of a naturalized citizen to his native country, his former duties return, and his duties to his adopted country still continue, under what contradictory obligations would he be placed. This was *lord Hale's* doctrine, but it is now done away. *Foster's Crown Law*, 185, *sec.* 4.

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It has been decided in England, in the case of *Marryat v. Wilson*, 1 *Bos. and Pul.* 430, that a natural born subject of that country admitted a citizen of the United States of America, either before or after the declaration of American independence, may be considered as a subject of the United States, so as to entitle him to trade to the East Indies under the 13th article of the treaty of 19th November, 1794."

HARPER, *same side*,

Asked whether the Court, in the case of the *Rapid*, had decided the question as to the difference between the British acts concerning letters of marque, prizes and prize goods, which authorize the capture of the property of *inhabitants* in hostile countries (and on which the British admiralty decisions are founded,) and the act of congress declaring war, which only gives a right to capture the property of *British subjects*.

JOHNSON, *J.* said the Court had fully considered that point and decided it in the case of the *Rapid*.

PINKNEY, *for the captors*.

We contend that the property even of a *native* American citizen domiciled in an enemy country at the time of the capture of such property, is liable to condemnation as prize of war; and, *a fortiori* the property of a *naturalized* American citizen, a native of the enemy country, under like circumstances; which is the case before the Court, and which will be first considered.

It has been contended on the other side, that a person naturalized in the United States is as much a citizen of this country as a native, and that he continues to be so, though he return to his native country and there engage in trade. It has been argued that, in order to become an American citizen, he must abjure his allegiance to his former government, that, consequently, though he should return to his native country, he can no longer be considered as under the protection of that government: that his new allegiance to the United States continues, and that our government is bound to protect him: that he is therefore to be considered in the

same light as a native citizen, and that his property is equally to be protected in case of war.

That a person so abjuring his native allegiance cannot claim protection from his former government, while he continues in the country of his adoption, is admitted; but we contend that if he voluntarily returns within the sphere of his original allegiance, he is as much a subject of his former government as if he had never emigrated; that the reciprocal duties of allegiance and protection, on the respective parts of the subject and the sovereign, are revived: he is no longer a citizen of the United States. The two allegiances are incompatible, we admit; the naturalization law of the United States clearly goes upon this idea; but in case of the party's return to his native country, it is the old allegiance which must prevail, and not the new, as is contended by the Claimant. By his return, he has, in fact, consented to resume his former allegiance: for he must be presumed to have known the laws of his country, and that those laws would impose upon him his old duties in case of his return. He is now, as *sir W. Scott* would call him, a *redintegrated* subject of his native country, and is liable to all his former obligations. He is now bound actively to support the government to which he has returned. In case of war, he may be compelled to take up arms against the country he has adopted; to pay taxes for the support of the war, &c. and this, not by arbitrary power, but of right. These obligations, it will be recollected, we contend are the effect of a *voluntary* return. We do not mean to say that if a naturalized citizen should enter the army of the United States and be captured by the nation to which he formerly belonged, during a war between the two countries, he would, on being carried to his native country as a prisoner, incur those obligations. But in the case now before the Court, the return of Gillespie, the Claimant, to England, was entirely voluntary. Without regard, therefore, to the question of domicil, Gillespie was, according to the doctrine for which we have been contending, politically an enemy of the United States, at the time of the capture of the Frances. If he was not an enemy, I should be glad to know who can be considered as such. If *he* is not *hostis*, who has every hostile duty upon him, I am at a loss to know who is.

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If the war had been sudden, humanity might plead in behalf of the Claimant. But in this case, there was no surprize. War had been threatening for a long time previous to its actual declaration. No indulgence, therefore, on this ground, can be claimed.

The counsel for the Claimant has cited lord *Coke* in support of his doctrine of naturalization, but does not seem to have considered that, according to that author, a British subject can never become a citizen of any other country.

The case of *Marryat v. Wilson* has also been cited. That case is perhaps entitled to some consideration; but even there, the Court had, at first, decided against Collet, and it was only upon the request of the American minister (Mr. King) that they consented to re-consider the case, when they finally decided in his favor.

2. If Gillespie was politically an enemy, at the time of the capture, the doctrine of commercial domicil is wholly immaterial in the present case. But as the Court may not view the subject in the same light as we do, a few remarks on the latter point may not be unnecessary.

We lay it down then, as an indisputed position, that the character of captured goods is decided by the commercial domicil of the owner at the time of capture. And we contend that Gillespie had a commercial domicil in Great Britain, at the time of the capture of the goods in question. It does not appear that he had, in any manner, put himself in motion—*in itinere*, to return before the capture. All the evidence showing his intention to return, arose *after* that event. A hostile character, therefore, attached to the property, if not to the owner.

This is not a case of withdrawing funds: it is a case of trade originating before the war, and continued after the war. Besides, the rule of withdrawal applies only to cases where the domicil of the party is not in the enemy country, though his trade is carried on and his property situated there. See *Coopman's* case, cited in the *Vigilantia*, 1 *Rob.* 12, 14. *Escott's* case, cited in the

Hoop, 1 *Rob.* 170, 201. *The Madonna delle Gracie*, 4 *Rob.* 161, 195.

It has been said, that at the time of the shipment of the goods in question, the war was not known in England, and that it would be a case of great hardship, under such circumstances, to subject this property to condemnation. But want of notice, in cases like this, is an excuse not known to the law of nations. See *Whitehill's* case (referred to in the case of the *Hoop*, 1 *Rob.* 170, 201)—Whitehill was a British subject—had been at St. Eustatius only two days and had no knowledge of the war—yet his property was condemned.

As to the fact, that public treaties frequently allow a particular time for the respective subjects of both parties to withdraw in case of war, it may be observed, that this is only providing against the exercise of a right which the contracting parties would otherwise have had. But these mutual concessions do not alter the nature or effect of the domicil.

At all events, Gillespie ought to have put himself in motion to return to the United States, immediately upon knowledge of the war. This he does not appear to have done: and, according to *sir W. Scott*, nothing but the actual force of the government is a sufficient excuse for the neglect. But no such excuse has been offered.

On either of the grounds, therefore, which have been taken in this argument, we conceive that the property in controversy must be condemned.

HARPER, *in reply.*

It is the nature of the trade, not the place of residence, which determines the hostile or neutral character of the trader.

We must still insist, that a naturalized citizen of the United States is a citizen to every intent, the right to be president of the United States only excepted, which exception but proves the general rule.

It is said, on the part of the captors, that a natu-

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ralized American citizen ceases to be such, when he returns to his native country. Suppose, then, while absent in his native country, a descent should be cast upon him in this—would he be considered by our Courts as an alien, so as to deprive him of the estate so cast upon him? Again, suppose, in case of war between the two countries, he should enlist himself under the banners of our enemy, and be found in arms against us, should we not consider him as a traitor, and treat him accordingly? If he choses to take such double responsibilities upon himself, it is his business to reconcile them: *we* can only consider him as an American citizen.

We might admit, perhaps, that by a return to his native country in time of war, he must be considered as having abandoned his rights as a citizen of the United States, in relation to trade: still, however, he could not throw off his duties But Gillespie returned in time of peace. He therefore did not assume new duties incompatible with those he owed to this country. He assumed only that temporary allegiance to the government of Great Britain, which every other stranger in that country owed. Upon the breaking out of the war, perhaps new duties might arise inconsistent with his duties as an American citizen. Yet, in that case, a reasonable time ought to be allowed him to remove; and if he made every reasonable exertion to return to the United States, and especially if he did actually return in less than a year after being informed of the existence of the war, which is the fact, he must be considered as having retained his American character.

The domicil of the owner at the time of capture, is not the criterion whereby to determine the character of the property captured, in all cases. If it be so *generally*, this case ought to be an exception. Gillespie was lawfully in England at the breaking out of the war: he cannot be presumed to have known that war would take place; it is impossible that he should have known it; such a presumption is unreasonable. *Whitehill's* case has been cited on the other side; but the counsel for the captors is mistaken as to the facts of that case. Whitehill knew of the war, and that St. Eustatius was in still, at the time he went there; which essentially distinguishes it from the case now before the Court.

PINKNEY, referred to the history of the times, to show that Whitehill had no knowledge of the war when he went to St. Eustatius.

HARPER. If Whitehill did not know that war had actually been declared, he knew that measures had been taken which may be considered as equivalent to a declaration. The capture took place in February. He knew that letters of marque had been issued in December preceding, and that a long irritation had existed between the two governments. He knew, also, that the trade in which he was engaged, was a trade frowned upon by his own government. In the present case, the circumstances were entirely different. 5 *Rob.* 220, 247.

*Saturday, March 12th. Absent....*LIVINGSTON, *J.*

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

Colin Gillespie, a naturalized American citizen residing in Glasgow, claimed sundry goods, shipped on his own account, as his property. This claim depends entirely on his national character, and is decided in the case of the *Venus*.

The sentence of the Circuit Court, condemning the property of the Claimant, is affirmed.

VOWLES AND OTHERS v. CRAIG AND OTHERS.

1814.

March 14th.

Absent... MARSHALL, *Ch. J.*

If a person, who has obtained a survey upon a military land warrant under the commonwealth of Vir

THIS case, as stated by TODD, *J.* in delivering the opinion of the Court was as follows:

This suit was instituted on the chancery side of the Circuit Court of the United States for the Kentucky district, by the Complainants, now Appellants as the heirs

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and legal representatives of Mary Vowles formerly Mary Frazer.

The bill alleges that in the year 1774 a survey was made for Mary Frazer as heir at law, and only daughter of George Frazer, dec'd. by virtue of the governors warrant and agreeable to the royal proclamation of 1763, for 2000 acres of land in Fincastle county, on Elkhorn creek, the waters of Ohio river. That according to usual and customary allowance, made in this, as well as other military surveys at that time, a considerable quantity of land over and above 2000 acres, is contained within the actual boundaries. That in the year 1778 whilst the said Mary was a minor, Michael Robinson, as guardian of the said Mary, and who had intermarried with her mother, made a contract with the Defendants Lewis, Joseph and Benjamin Craig's, for the sale of the said 2000 acres of land surveyed as aforesaid for the said Mary at the price of 30*s.* per acre, amounting to 3000*l.* which was paid in the depreciated paper currency of Virginia and was of little or no value. That the said Mary was induced to affix her signature to an assignment of the said plat and certificate of survey, which was post-dated so as to bear the appearance of its being executed when she was of full age; in consequence of which Lewis Craig obtained a patent for the said land in his own name and has since conveyed a part thereof to the said Joseph and Benjamin, and under whom the other Defendants derive their titles. The prayer of the bill is to vacate the contract and to decree a re-conveyance of the land, and for general relief.

gin'a for 2000 acres, sell and transfer, for a valuable consideration, his right to the survey, and assign the plat and certificate to the purchaser, whereup on he obtains a patent for the land in his own name; and if, upon a re-survey, it appear that the grant conveys 2701 acres, the vendor cannot in equity support a claim for the surplus, against the vendee.

The answers of the Defendants, Lewis and Joseph Craig's, admit the making of the survey, and that it contains a considerable quantity of land within the boundaries more than 2000 acres.

They admit the contract with Michael Robinson for the purchase of the said survey; but positively deny that it was made in the year 1778, and aver that it was made in 1779. They deny that the contract was for 2000 acres of land at 30*s.* per acre, but was for the *whole survey* at the price of 3000*l.* They also positively deny that the assignment on the plat and certificate of

survey was post-dated or that any fraud, or misrepresentation was practiced or used relative to the transaction

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The answers of the other Defendants are deemed immaterial to the investigation of the questions arising in this case.

The cause was heard in the Circuit Court upon the bill, answers, depositions and other proofs. The Court decreed the bill to be dismissed with costs; from which decree an appeal was taken to this Court.

TAYLOR, *for the Appellants.*

On examination of the evidence exhibited, we are satisfied, that the allegation, that the assignment was made during the minority of Mary Frazer is not sufficiently supported to have authorized the Circuit Court to have decreed a re-conveyance. But we suppose the Complianants were entitled to relief in some shape for the surplus land contained within the survey; either by a decree for the re-conveyance of the surplus, by a pecuniary compensation for it according to its present value or by a pecuniary compensation according to the price at which the land was sold, on which interest should be allowed.

No evidence is introduced of the terms of the sale, whether by the acre or in gross, except the survey, assignment, power of attorney and receipt before mentioned, from these it plainly appears that the parties contracted on a supposition that the quantity of land sold and purchased was 2000 acres.

The surplus of 700 acres (nearly one third of the whole quantity supposed to be sold) cannot be considered as a small one, such as might arise from inaccuracy of instruments, &c. and therefore within the contemplation of the parties.

The remote residence of the vendor, who had but lately attained full age when she sold, precludes the idea of her having any information of the quantity of land to which she was entitled, other than that which was derived from the survey. On her part, therefore, and probably on the part of the purchaser also, the contract was

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made under an evident mistake respecting the subject of sale. There is nothing discoverable in the contract or exhibits from which it can be collected that the sale was made without responsibility for the quantity, the words, *more or less*, almost universally used to designate such an intent, are no where to be found.

The case presented is that of a contract made under the influence of mistake, in both parties, as to a material and important part, without fraud or concealment on either side.

It is supposed that no difference exists between contracts for the sale of lands, and those of any other description. The same principles apply to all. This doctrine is recognized in the opinion expressed by the Court of appeals in Kentucky, in the case of *Young against Craig*. In delivering that opinion the Court expressed itself as follows: "The question in this case is whether Craig who had sold to Young a tract of land containing in its boundaries a surplus, has a right to recover such surplus, or incase it cannot be had, a compensation therefor in money. There is no novelty or peculiarity in the principles upon which questions of this sort depend. In contracts of this kind the same good faith is required, and the same responsibility attaches to its violation, which law and reason prescribes in every description of contracts. If, through fraud or gross and palpable mistake, more or less land should be conveyed than was in the contemplation of the seller to part with, or the purchaser to receive, the injured party would be entitled to relief in like manner as he would be for an injury produced by a similar cause in a contract of any other species."

The same opinion also establishes the principle that in sales in gross as well as in sales by the acre, if the parties have contracted under manifest error as to quantity, the party injured is entitled to relief, unless indeed, the surplus or deficit was small, not more than usual in such cases, and of course supposed to be within the contemplation of the parties. In that case it is true the Court refused to decree compensation for the surplus land sold, because it appeared plainly to have been the intention of the parties to risk the gain or loss, and because the sur-

plus was not more than usual in such sales.* In the case of Young v. Craig, the Court appears to have adopted the principle laid down by Pothier in his treatise on obligations, *ch.* 1, *art.* 3, *s.* 1, *title Error*, and also by the writers on natural law, "that an error about a thing, or about its quality, upon prospect of which a man

* The opinion of the Court of appeals in Kentucky in the case of YOUNG v. CRAIG, was as follows:

The question in this case is whether Craig who had sold to Young a tract of land containing in its boundaries a surplus, has a right to recover such surplus, or in case it cannot be had, a compensation therefor in money.

There is no novelty or peculiarity in the principles upon which questions of this sort depend. In contracts of this kind the same good faith is required. And the same responsibility attaches to its violation, which law and reason prescribe in every description of contract.

If through fraud, or gross and palpable mistake, more or less land should be conveyed than was in the contemplation of the seller to part with or the purchaser to receive, the injured party would be entitled to relief in like manner as he would be for an injury produced by a similar cause in a contract of any other species.

In this case however there is no evidence of fraud; and the only ground, from which an inference can be deduced that there was such a mistake as would justify the interference of the Court for the purpose of correction, is the surplus contained in the boundaries described by the deed. Whether this ground be sufficient to justify such an inference depends upon the nature and terms of the contract.

Contracts for the sale of land may be considered of two descriptions. 1st. Where the sale is of a specific quantity, which is usually denominated a sale by the acre, and 2dly, where the sale is of a specific tract by name or description, each party risking the quantity; and this latter, for sake of brevity, is sometimes called a sale in gross.

It is evident that in a sale per acre, much less variation from the quantity intended to be conveyed would afford evidence of a mistake which would justify the interposition of a Court to correct it, than would be sufficient for that purpose in a sale of the other description. But even in a sale per acre, as from the roughness and waveness of the ground from the variation of instruments and from the different results that will necessarily be produced by different surveyors operating with the same instruments, it is impracticable to ascertain the quantity with perfect precision, a small deficit or surplus, however exactly the parties may have intended to be confined to a specific quantity, would not justify an application to a Court of justice for relief. In many cases, however, of sales of this sort, the parties did not intend to be very scrupulously exact with respect to the quantity. There was particularly in the sales made at an early period of this country great liberality of admeasurement frequently allowed by the seller and expected by the purchaser. Where this was the case to authorize a conclusion from the surplus contained in the boundaries of a tract, that there was a mistake of quantity, the surplus ought to be greater than was usual in conveyances made about the same period and with the same intention of allowing liberal admeasurement. But as in some sales of an early period, and in perhaps a great majority of those of a more recent date, such a liberality of admeasurement was not intended by the parties it would be obviously improper and unjust to lay down any general rule as to the rate of surpluses that would justify an inference of a mistake which would deserve a correction. Each case must depend much upon its own particular circumstances. Whether such an inference would be authorized in the present case were the sale in question per acre, and not in gross, need not be determined since we are of opinion it is of the latter description.

is induced to come to any agreement, renders the agreement or bargain void, for in such case a man is not supposed to have agreed absolutely but upon supposal of the presence of such a thing or quality, on which as on a necessary condition, his consent was founded, and therefore, the thing or quality not appearing, the consent is understood to be null and ineffectual." *Puffendorf's Law of Nature and Nations, b. 1, c. 3, s. 12.*

On these principles as applied to this case the Complainants would be entitled to compensation, or the contract would be considered as void, unless it was in proof that the surplus was not unusually great, and was not more than may reasonably be supposed to have been in contemplation of the parties. As the consideration of quantity does not appear to have been the operating motive which led to the contract though it certainly influenced the price, according to the principles established by writers on natural law, it would appear that the error of the parties rather afforded a ground for a decree of compensation than for annulling the contract.

From an examination of the documents exhibited it will clearly appear that the parties contracted under an opinion that the survey contained only two thousand acres, the survey itself specifies that quantity. The

The deed of conveyance must be taken as conclusive evidence of the terms of sale unless it had been shown that language not comporting with the true intention of the parties had been inserted through fraud or mistake, of which there is not the slightest indication in this case.

The deed describes the land by its boundaries and situation, and as "containing by survey four hundred and twenty-five acres, be the same more or less." The plain and most obvious meaning of the expressions "be the same more or less" is that the parties were to run the risk of gain or loss as there might happen to be an excess or deficiency in the estimated quantity. This it is believed is the sense in which such an expression is uniformly understood by both the learned and the unlearned. This idea is not repelled by the expression of the quantity of acres; on the contrary it rather derives strength from the manner in which the quantity is mentioned, for it plainly indicates that the expression of quantity was used as matter of description only and that it was the intention of the parties not to be confined to a precise and specific quantity.

We do not mean to be understood that in a sale of this kind the surplus or deficit might not be so great as to authorize an inference that it had been produced by fraud or mistake; but in this case where the estimate of quantity was 425 acres and the largest quantity which any subsequent survey has made it is 481 the surplus does not appear so great as not to be within the reasonable limits of a risking bargain of this kind. See in support of this doctrine..... Sugden 225, 6 —1 Call. 301. We are therefore of opinion that the decree of the Circuit Court in favor of Craig was erroneous and must be reversed with costs.

power of attorney to Joseph Craig describes the land as 2000 acres and the receipt of Michael Robinson for the last payment states it expressly to be in full for 2000 acres of land the property of Mary Frazer. There is not an expression used which shews an intention on either side to make a risking bargain.

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No evidence appears in the record to shew that military surveys do usually contain surplus lands, and it is supposed without such proof the Court cannot take judicial notice of such an allegation.

But if the Court should recognize it, must it not also be admitted that the surplus in this case (one third) is much more than is usual. The influence of error on the contracting parties being proved, it lies on the Defendants to bring themselves within the exceptions stated in the case of Young v. Craig, by the exhibition of satisfactory evidence on those points, this has not been done.

If the Complainants are entitled to relief the next enquiry is, how it should be granted. The object of the parties being a sale and purchase of 2000 acres of land, the contract being made for that quantity only, could Lewis Craig be compelled to receive and pay for more? Let it be supposed that he had made an improvident bargain, that the lands were not worth the price he gave or that since the sale they had greatly depreciated in value, Mary Frazer or her representatives could, on no principle of equity, take advantage of her own error to require payment for a greater quantity of lands than had come within the contract, and Lewis Craig might relieve himself by a conveyance of the surplus land.

As Lewis Craig was not exposed to the risk of depreciation in value, on principles of reciprocity Mary Frazer and her representatives should be placed in the same situation, and should be entitled to a specific re-conveyance, so far as it can be had without affecting the rights of others. It appears from the proceedings that Lewis Craig is still in possession and the owner of a part of this land, and that Joseph Craig who was concerned in the purchase, holds another part; so far as these extend, a specific re-conveyance may be decreed. As to the other

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Defendants who appear to have been purchasers, and who probably had not notice of the latent equitable claim of the Complainants so as to affect them, it is not contended that they can be compelled to convey. As to the quantity deficient after the conveyance of the lands held by Lewis and Joseph Craig, a decree for pecuniary compensation according to the present value, if the principles before stated are correct, is the appropriate relief. If the Court should be of opinion that the Complainants are entitled to their decree in respect to the surplus land, but should not consider the principles before stated correct, as to the manner in which it should be granted, no alternative seems to remain but that of adopting the original price (said to have been $5 per acre, and from calculation appearing to have been so,) as the measure of compensation. The purchasers having had the use and received the rents and profits of the land should, as an equivalent, be decreed to pay interest, and an account should be decreed to ascertain the value of the paper money on the 20th December, 1779, and the interest which has accrued.

The length of time which has been suffered to intervene may perhaps be considered as amounting to a waiver of the Complainants equitable right, and be made an objection to a decree for relief in any shape.

In reply to this the following facts, which appear on the record, are stated.

That the Defendants soon after their purchase removed to Kentucky, where they continued to reside, and that Mary Frazer and her representatives always resided in, or near Fredericksburgh, in Virginia.

BLEDSOE, *for the Appellees.*

Craig purchased Mary Frazer's interest, be it much or be it little. Her interest was all he purchased, and all he could obtain. And as evidence of it she assigned the *plat and certificate of survey*, that the patent might issue to Craig for whatever the survey contained. There was no mistake here. If Craig has got more land from the commonwealth of Virginia than he ought to have had, is Mary Frazer or her representatives to step into the

place of the commonwealth to correct the error or the fraud? Or is she to step into Craig's place to defraud that commonwealth or to take advantage of the error of its officer because she once owned 2000 acres of land which she has parted with? Had she carved and granted a definite interest out of her claim, retaining a part, the question might be differently settled. But in this case she would be worse than a volunteer who cannot be compensated in equity. She would be a volunteer *mala fide*.

A Complainant in equity must recover on the strength and soundness of his own title. It is not sufficient that the Defendant is in the *wrong*; the Plaintiff must have *right*.

If the claim of the Complainants to any part of *the land itself* were to be sustained, where would you begin on the survey to correct the error? On which end, side, or corner? The beginning and ending corners of a survey are arbitrarily designated by the surveyor when he makes out his plat and cetificate: seldom or never corresponding with the actual stages of process on the ground itself.

But as it was clearly the intention of the parties that the whole should be sold, and as the evidence of the whole was transferred, the utmost that the Complainants could, in any event conscientiously ask, would be, that the Defendants should refund a part of the purchase money, in proportion to the surplus, with interest, which must be reduced by the scale of depreciation.

TODD, *J.* after stating the case, delivered the opinion of the Court as follows:

In the written arguments submitted by the parties, it is admitted by the counsel for the Appellants that the evidence exhibited, does not support the allegation in the bill, that the assignment was made during the minority of Mary Frazer. This admission renders it unnecessary for the Court to go into a minute examination of the evidence; it will be sufficient to observe that the testimony is clear and satisfactory on this point; and, therefore, there is no pretence for setting aside the contract and decreeing a re-conveyance of the land. But it is contended that the Complainants are entitled

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to relief in some shape for the surplus land contained within the survey; either by a decree for the re-conveyance of the surplus land; by a pecuniary compensation for it according to its present value; or by a pecuniary compensation according to the price at which the land was sold, on which interest should be allowed.

This argument assumes for its basis, that there existed a *mistake* as to the thing sold. If there was a mistake, how did it originate, and who is injured thereby? Was there a *mistake?* It may be enquired to what quantity of land was Mary Frazer entitled by virtue of the governor's warrant issued in pursuance of the royal proclamation? To two thousand acres. How much did she sell and receive payment for? Two thousand acres. It would appear from this that she had sold and received payment for as much land as she was entitled to. How comes it, that this surplus was included in the survey? From the fraud, design, ignorance or negligence of the surveyor. Who is defrauded or injured thereby? The commonwealth of Virginia, and not Mary Frazer. For what is it asked that compensation shall be made? For land which, by the fraud, design, ignorance or negligence of the surveyor, Mary Frazer might by possibility have been entitled to. Was the sale of this survey of a *specific quantity*, at a certain price per acre? or was it a sale of a *specific tract?* The bill alleges it was of the first description; the answers deny it, and say it was of the latter. There is no proof to support the allegation in the bill, unless from the survey, a power of attorney, and the receipt for the purchase money, it should be inferred, that as they relate to 2,000 acres of land, *only* that quantity was intended to be included in the sale. But this proof is conceived to furnish a very opposite conclusion, the *description* and *designation* of the tract of land sold, not as *part* of a tract, but an *entire* tract. The answers, being supported by the assignment, that it was a sale of the whole survey, and being also responsive to an allegation as well as to an interrogatory in the bill, must be taken as true and conclusive. When an assignment is made of a plat and certificate of survey, the purchaser takes it subject to the *risk* of its containing a less quantity than is expressed on its face, and should it contain more he is intitled to it. In the case of *Young*

v. *Craig*, decided by the Court of Appeals of Kentucky, (a copy of which has been furnished and relied on by each party) the Court say, "there was, particularly "in the sales made at an early period of this country, "great liberality of admeasurement frequently allowed "by the seller and expected by the purchaser. Where "this was the case, to authorize a conclusion, from the "surplus contained in the boundaries of a tract, that "there was a mistake of quantity, the surplus ought to "be greater than was usual in conveyances made about "the same period." Now it appears from a statement in the bill, as well as from the general history of the country, that it was usual and customary to make considerable allowance in military surveys; and it is not shown that the surplus in this is greater than in other surveys made about the same time. Again, in the same case, the Court proceed, "it would be obviously im- "proper and unjust to lay down any general rule as to "the rate of surplus that would justify an inference of "mistake which would deserve correction; each case "must depend upon its own particular circumstances; "whether such an inference would be authorized in the "present case, were the sale in question per acre and "not in gross, need not be determined since we are of "opinion it is of the latter description." If this reasoning be correct as to conveyances, it will apply with redoubled force to assignments of plats and certificates of survey, where the purchaser takes it subject to the risk of its containing less than it specifies.

Mary Frazer or the Complainants can be considered in no other view, than mere volunteers *mala fide*, and of course not entitled to the aid of a Court of Equity.

It seems, as a necessary consequence, if the Complainants are not entitled to the surplus land, they are not to compensation in either of the other modes contended for. Where there is no *right* there can be no claim to compensation sustained.

Decree affirmed with costs.

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Property engaged in an illicit intercourse with the enemy, to be condemned to the captors, not to the U. States. A municipal forfeiture under the laws of the United States is absorbed in the more general operation of the law of war. The prize act of 26th June, 1812, operates as a grant from the U. States to the captors, of all property rightfully captured by commissioned privateers, as prize of war.

THIS was an appeal from the decree of the Circuit Court for the district of Massachusetts.

The facts of the case were as follow:

The brig *Sally*, John Porter, master, was captured by the privateer Jefferson, John Kehew, cammander, July 7, 1812, as prize, and sent into the port of Salem, in the district of Massachusetts, for adjudication. The Sally, at the time of her capture, had on board a coaster's manifest, and a permission from the collector of the port of *Passamaquoddy*, dated *July 7, 1812*, to proceed to *Boston*. From the manifest, her cargo purported to be *one box* of hones, and *one box* of furs. She had on board, also, about *four thousand bushels of salt*.

The Sally was licensed and enrolled for the coasting trade, at New London, *June 6, 1812*, upon the oath of *John Patterson*, of the city of *New York*, who swore that he was the agent of *James Mavor*, of *New York*, the owner.

Patterson was on board at the time of capture. Upon the return of the monition in the District Court, *Patterson* claimed the brig for *Mavor*, and *Edward Monroe* claimed the salt for himself and *Lemuel P. Grosvenor*, of *Boston*.

The affidavit of claim of Monroe did not state where the salt was taken on board, nor for what reason it was not mentioned in the manifest.

Patterson, *Porter*, the master, and the crew, upon the preparatory examinations, swore that the salt was put on board the brig at *Robinstown* and *Eastport*, in the district of Maine.

Among the papers found on board the Sally, was a permission to land her cargo of 60 tons of cordage and 50 bolts of duck, from the deputy collector of the port of Passamaquoddy, dated *June 20, 1812*.

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There was also found on board, a letter to Messrs. *Monroe* and *Grosvenor*, *Boston*, dated Eastport, *July* 7, 1812, signed "*L. P. G.*" covering a bill of lading of the salt. In this letter it is said, "I am sorry to say that no clearance of the salt can be obtained on board the brig; I have however despatched her, with a clearance of two small packages of John Brewer, consigned *to us*, and leave you to manage; it will, at least, be as well as the other goods sent—and I am hourly expecting a *seizure to pay for sundry prizes taken from St. Andrews.*" Again—"A protection can be had, for any vessel bound here with provisions, from the English admiral, &c." St. Andrews is a small town in New Brunswick, a province belonging to Great Britain.

In the manifest of the Sally, the two small packages above mentioned are consigned to *Monroe* and *Grosvenor*, Boston.

The captors produced witnesses in the District Court, who proved that the Sally discharged at *St. Andrews*, her cargo of cordage, after the 1*st July*, 1812, and took in there the salt.

The vessel and cargo were condemned, in the District Court, to the captors, and an appeal entered by the Claimants. In the Circuit Court the decree was affirmed, and Monroe and Grosvenor appealed to this Court.

A claim was interposed by the United States as for a forfeiture under the non-intercouse act.

On the above statement (and upon the argument in the case of the *Rapid*, *ante p.* 155,) the case was submitted.

Tuesday, March 15*th.* *Absent*....MARSHALL, *Ch. J.*

STORY, *J.* delivered the opinion of the Court.

This case cannot be distinguished from that of the *Rapid*. It was there decided that property engaged in an illicit intercourse with the enemy, is liable to con-

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fiscation as prize of war, and the only remaining question now before us, is, to whom it shall be condemned—to the captors, or to the United States.

By the general law of prize, property engaged in an illegal intercourse with the enemy, is deemed enemy property. It is of no consequence whether it belong to an ally or to a citizen; the illegal traffic stamps it with the hostile character, and attaches to it all the penal consequences of enemy ownership. In conformity with this rule, it has been solemnly adjudged, by the same course of decisions which has established the illegality of the intercourse, that the property engaged therein must be condemned as prize to the captors, and not to the crown. This principle has been fully recognized by sir *William Scott*, in the *Nelly*, 1 *Rob.* 219; and, indeed, seems never to have admitted a serious doubt.

But a claim is interposed by the United States, claiming a priority of right to the property in question, upon the ground of an antecedent forfeiture to the United States, by a violation of the non-intercourse act, (of March 1, 1809, vol. 9, p. 246, § 5) the goods having been put on board at a British port, with an intent to import the same into the United States.

We are all of opinion that this claim ought not to prevail. The municipal forfeiture under the non-intercourse act, was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the purview of mere municipal regulations; but is confiscable under the *jus gentium*.

But even if the doctrine were otherwise, which we do not admit, we are all satisfied that the prize act of 26th June, 1812, ch. 107, operates as a grant from the United States of all property rightfully captured by commissioned privateers, as prize of war. The language of the 4th, 6th and 14th sections is decisive.

The decree of the Circuit Court, condemning the vessel and cargo to the captors, is affirmed.

THE EUPHRATES.

THIS was an appeal from the sentence of the United States' Circuit Court for the district of Rhode Island.

Further proof, inconsistent with that already in the case, relied on the part of the Claimant.

The merchandize, in this case, was libelled in the District Court of Rhode Island, as belonging to subjects of Great Britain. The capture was stated in the libel to have been made on or about the 23d day of August, 1812. No libel was filed against the vessel.

In June term, 1813, a claim was interposed on behalf of the United States, on the ground that these goods were imported in violation of the non-intercourse laws.

In May, 1813, Matthias Bruen interposed a claim to certain merchandize on board of the Euphrates, alleging that he *is* the sole legal owner thereof.

The papers connected with this shipment were as follow:

1. An invoice, dated Mansfield, 30th June, 1812, purporting the goods therein described to be shipped at Liverpool, under insurance, consigned to Mr. Henry Watkinson, New York, or, in case of his absence, to Mr. John French Ellis of that place, for sale, *on account of the manufacturers, Siddons and Johnston*, who were British subjects.

2. A bill of lading by which it appeared that the goods were shipped at Liverpool, on the 7th of July, 1812, on board of the Euphrates, to be delivered to Henry Watkinson, he paying freight, &c.

3. A letter from Siddons and Johnston, dated Mansfield, 30th June, 1812, in which they say, "We have, "this day, consigned to you for sale on our account, "sixteen trunks," &c. (which are the goods claimed.) "We hope we shall shortly hear of sales being made "by you, to advantage: we hope they will at least net "us what they are invoiced at, covering all expenses."

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"We shall leave this shipment to your discretion to "make the best and most advantageous returns you "can."

There being no proof whatever, on the part of the Claimant, and he not appearing to have any interest whatever, by any of the papers on board, the goods were condemned both in the District and Circuit Courts, and the Claimants adjudged to pay costs to the Libellants.

From this decree there was an appeal, on the part of Mr. Bruen, to this Court.

HARPER, *for the captors,*

Stated that this was merely a question of further proof offered on the part of the Claimants. The captors, he said, relied upon the documentary evidence produced in the cause. This evidence he stated to the Court, and contended that it was too plain and consistent to justify the Court in allowing the Claimant further proof.

STOCKTON, *contra,*

Stated that the object of the further proof now offered, was to show that Watkinson was agent for a manufacturing house in England; that the Claimant ordered certain goods through this agent; that, on the passage of the non-intercourse act, he directed the goods not to be shipped, &c..

DAGGETT, *same side,*

Observed that it had been generally supposed that the rules of the English Courts respecting further proof, would not apply to the Courts of the United States, but that parties would have the benefit of new evidence in this Court, in prize cases as well as in other cases in admiralty; and that the parties in the present case had acted on that opinion.

The case was then submitted.

*Tuesday, March 15th. Absent....*MARSHALL, *Ch. J.*

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LIVINGSTON, *J.* delivered the opinion of the Court.

The Court does not understand the counsel for the Appellant as contending that there was any error in the sentence of the Circuit Court, or that any other than sentence of condemnation could have been pronounced there. It was, indeed, a very clear case, on the proceedings before that Court. But it is supposed that Mr. Bruen is entitled to an order for further proof; and that the facts which he will be able to make out, if an opportunity be afforded him, will entitle him to a restitution of the property.

Without rejecting the application on account of its being made at so late a period, the Court has looked into the proof which it is proposed to bring forward, and, on comparing it with the proof already in the cause, we are of opinion that it is totally incompetent to make out a title in the Appellant. There is not the least reason to believe that these goods were shipped in consequence of any previous orders given to Mr. Watkinson by merchants in this country, and transmitted by him to Messrs. Siddons and Johnston. On the contrary, whatever orders may have been sent to those gentlemen by Mr. Watkinson, it is most manifest that they did not, in this case, act upon them; for the invoice and letter accompanying the shipment announce, in terms not to be misunderstood, that these goods were sent to the United States for the exclusive account and at the sole risk of the British manufacturers.

It has not escaped the notice of the Court, that not one of the gentlemen who are alleged to have given orders for these goods on Messrs. Siddons and Johnston, through Mr. Watkinson, and who all reside in the United States, appears as a Claimant for any part of them. Instead of this, we find them, or several of them, assigning their interest in this adventure, whatever it may be, to the Claimant; but for what value does not appear; and every instrument takes care to express that the property is to be recovered at the risk and expense of Mr. Bruen. Thus is a total stranger to the shipment, and a mere volunteer who may not have paid

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a single cent for his title, made a party Claimant; a mode of proceeding novel at least, and well calculated to awaken suspicions not at all favorable to his pretensions. Whether a title to goods obtained in this way, would, under any circumstances, be sustained by a Court of prize, we will not say; but it is, in our opinion, sufficient reason, of itself, to refuse the party any opportunity to make further proof. Mr. Bruen not only does not pretend that he owned any part of these goods at or previous to the time of capture, but merely that he was the legal owner at the time of filing his claim; and upon the affidavits now laid before the Court, as the ground of an order for further proof, it appears that this legal title was acquired in the way already mentioned; that is, by a number of persons assigning to him a *chose in action*, which they must have considered of no value, or, at any rate, not worth pursuing. Such conduct can entitle the party to no favor or indulgence whatever. Upon the whole, the Court is as well satisfied with the decree of the Circuit Court, as it is with the total insufficiency of the evidence in reserve to produce any alteration in it.

The application, therefore, for further proof is rejected, and the sentence of the Circuit Court affirmed with costs.

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A case of withdrawing funds, and further proof.

THIS was an appeal from the sentence of the United States' Circuit Court for the district of Rhode Island.

The following is a statement of the facts connected with the case.

General Garret Visscher, *alias* Fisher, a native of the state of New York, entered into the British army before the revolution, and having obtained the rank of lieutenant general, died in England, rich, intestate, and without issue, leaving a large number of relatives citizens of the state of New York, residing at or near Albany. Mr.

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Nanning J. Visscher, one of the number, went to England, and met with no obstruction in obtaining letters of administration, and possessing himself of the estate to the amount of 150,000*l.* sterling. In August, 1812, he set himself in motion to return to the United States, and did return, leaving Mr. Harman Visger, his agent, in England, to transmit the property to the United States, for the use of those concerned. Harman Visger, finding that he could not remit to this country in the course of exchange, without great loss, invested a large sum in goods of the growth and manufacture of Great Britain, and to transmit a part of them to the United States, hired, on freight, the brig Mary, an American registered vessel belonging to J. B. Kennedy of South Carolina. The brig being at the port of London, was sent to Bristol, in July, 1812, to take on board this cargo. She arrived off that place, according to her log-book, on the 23d of the same month. On the 30th, an embargo was laid in England, on account of the war; and, on the 1st of August, the custom house mark of *stop* was put on the Mary. Having been detained, some time, by the embargo, she sailed from Bristol, with the cargo on board, on or about the 15th day of August, 1812, bound to New York. Soon after she put to sea, she sprung a leak, and, on the 21st day of August, 1812, put into Waterford, in Ireland, to repair. Requiring a complete repair, her cargo was re-landed and stored in the King's store-houses, and she was repaired by the freighter, at an expense of 1700*l.* sterling; to secure which he took from the captain a bottomry bond. On the 7th of April, 1813, the Mary sailed from Waterford; having cleared out for Newport, in Rhode Island, in order to avoid the blockade which was supposed to exist as to New York. Before sailing, a British license of the description usually denominated a *Sidmouth* license, was obtained for her from the king's privy council, by Mullet, Evans & Co. subjects of the king of Great Britain. The license ran in their name, and purported to be a renewal of a similar license granted on the 8th of July, 1812. She had no license from the American government. On the 23d of April, 1813, she was captured on the high seas, by the American privateer Paul Jones, and sent into Newport with a single prize master on board, the captain being left in command of the vessel and in possession of the ship's papers. On her arrival at Newport, she was li

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belled by the captors, as being and bearing enemy property, and also by the United States for a breach of the non-intercourse acts. The Claimants made application to the secretary of the treasury, and he, under the act of January 2, 1813, "directing the secretary of the treasury to remit fines, forfeitures and penalties, in certain cases," remitted the forfeitures and penalties accruing to the United States.

The brig's papers were regular, proving her to be an American registered vessel.

The invoices and bill of lading stated her cargo to be shipped by Harman Visger, on account of the heirs of general Fisher, citizens of the United States, and consigned to Peter Remsen & Co. New York, to account with Nanning J. Visscher, administrator, or with Barent Bleecker, Esq. of Albany, agent for the heirs. The invoices were all dated 13th August, 1812. The bill of lading had no date; but by its reference to the invoices, the shippers have given it the semblance of the same date.

War was declared by the United States against Great Britain on the 18th of June, 1812, and the fact was known in London on the 26th of July, following; the news was stated on that day in the public gazette in London, to have been received in Liverpool on the 18th of the same month.

The Claimant was in England when the Mary sailed, and for some time after, and made no attempt to countermand the voyage. Insurance was obtained in England, freight paid, as well as license and brokerage money, and the exportation duties, before the Mary sailed.

The brig and cargo were acquitted in the District Court, but condemned in the Circuit Court; and from the decree of the latter the Claimants appealed.

STOCKTON, *for the Claimants.*

It is contended, on the part of the Appellants,

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1. That the cargo in question having been purchased by citizens of the United States, either before the war was actually declared, or before that event was known in England, and with the sole intent of transferring American funds in England to the United States, the shipment was no act of illegal trading with the enemy, and no cause of forfeiture.

2. That the act of congress of 2d January, 1813, authorizes this importation, and, by legal construction, amounts to a license for this vessel and cargo.

3. That the circumstance of the vessel's sailing with a Sidmouth license, is no cause of forfeiture.

4. That the capture by the privateer was altogether unwarranted by its commission, and expressly against the instructions of the President of the United States; and therefore that the property ought to be restored with damages and costs.

As to the first point, the withdrawing of funds, we contend that a person found in a foreign country at the time of the breaking out of a war between that country and his own, has a right to do every thing necessary to enable him to return to his own country with his effects. This doctrine is supported by weighty authorities, and is founded on principles of reason and justice. It is, besides, an act of sound policy in a nation to permit its own citizens to withdraw their funds from the hostile country; it is taking from the enemy's means of carrying on the war and adding to its own. According to the old rule on this subject, the withdrawing of funds from the enemy's country was a matter of *right*; but the modern rule of the Court of Admiralty has determined it to be a matter of *favor* merely. If it be a matter of favor, we conceive it is such a favor as both reason and policy would direct, in a case like this, to be granted. See 4 *Rob.* 161, 195. *The Madonna delle Gracie.—Chitty's law of nations*, 19, 20.—4 *Rob.* 191, 232. *The Dree Gebroeders.*—1 *Bos. & Pul.* 345. *Bell & al. v. Gilson.*—1 *Rob.* 184, 220. *The Betty Cathcart.*

2. As to the act of the 2d January, 1813, (*laws U. S. vol.* 11, *p.* 341.) This act amounts to a license from the

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American government. The remission of the forfeitures incurred by a violation of the non-intercourse laws, is to be considered as legalizing voyages made under circumstances like those of the present case. The act ought to be liberally construed. It cannot be supposed that the United States meant to remit the penalties accruing to them for the violation of the non-intercourse laws, in order to benefit the privateersmen:—The remission was intended exclusively for the benefit of the owners; against whose claim the legislature supposed the non-intercourse law to be the only bar.

Again, the act of 2d January, must have been known in Ireland long before the Mary sailed from Waterford for the United States. She may therefore be considered as having sailed from that port under the faith of this act, as she had commenced her voyage from Bristol between the periods specified therein.

The act of 13th July, 1813, relinquishing the claims of the United States, &c. does not favor the claim of the captors, inasmuch as it relinquishes only the property of *British subjects*, not captured in violation of the instructions of the 28th August, 1812; whereas the property in the present case, belonged to Americans.

The Mary sailed from Bristol, or, at all events, from London, which is to be considered as the *terminus a quo* of the voyage, in consequence of the repeal of the British orders in council; and is therefore to be considered as embraced in the president's instruction to privateers, of 28th August, 1812.

3. The Sidmouth license is no cause of condemnation, inasmuch as the original licence was obtained before the war was known in England, and the second was merely a renewal of the first; the British government conceiving themselves bound, in honor and good faith, to renew it.

There is no analogy between the present case and that of the *Julia*, decided yesterday. In that case, the license was granted, *flagrante bello*, in order to neutralize belligerent property. But here, the granting of the license was only an act of justice, which the British government conceived themselves bound to perform.

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The act of congress of *July 6th*, 1812, (*Laws U. S. vol. 11, p. 302, § 6*) allows passports to be given for the safe transportation of any ship or other property belonging to British subjects, and then in the United States. This is just what the British government have done in the case of the Mary. The granting of the license was merely a reciprocity of good offices on their part.

But admitting this to be a case of sailing under the flag and pass of the enemy, still the vessel only, and not the cargo, would be liable to condemnation. As to this distinction between the ship and goods sailing under the enemy's flag, see *Chitty's Law of Nations, p 58. 5 Rob. 2, The Vrow Elizabeth.*

4. This capture was illegal; being altogether unwarranted by the commission of the privateer, and directly in the face of the president's instruction of 28th August, 1812. This instruction prohibits the capture of "vessels belonging to citizens of the United States coming "from British ports to the United States laden with "British merchandize, in consequence of the alleged "repeal of the British orders in council." These were the precise circumstances of the vessel in question. The capture was therefore illegal.

That the president had a right to issue the instruction under consideration, cannot admit of doubt. By virtue of his office, he is commander in chief of the army and navy of the United States; and, as such, has, in time of war, the whole public armed force of the nation under his control. The privateers of the United States constitute a part of that public armed force. The president was therefore authorized to issue this instruction. *2 Azuni, 355.*

From the preceding considerations, we trust the Court will feel itself justified in reversing the sentence of the Circuit Court.

J. WOODWARD, *contra.*

If the character of the Mary was, *prima facie*, belligerent, she must be condemned. No latent equities

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can save her. That such was her character, appears clearly from the examination *in preparatorio;* and a vessel must be acquitted or condemned generally, according as her character appears upon that examination. The license was for a *British or American* cargo. The presumption is, that it was *British.* It was certainly British *fabric.* No American orders had been given for the goods. The whole appeared as British property, and at the risk of British subjects. If a vessel sails under such circumstances, she sails at her peril. 6 *Rob.* 24, *The Marianna.* 5 *Rob.* 194. *The Tobago.* 6 *Rob.* 134.

But admitting, for argument's sake, that the property is, as the Claimants contend, *American* property, still the transaction now under consideration was a withdrawing of funds from the enemy's territory after a full knowledge of the war, without the license of the American government; and therefore subjected the property so withdrawn, to capture and condemnation as prize of war.

The property in question was certainly British long after the knowledge of the war in England; and the purchase of it by an American citizen in the territory of the enemy was an illicit trade, which is, of itself, cause of condemnation. That the property was British for a considerable time after the war was known in England, appears from the dates of the invoices. They are all dated 13th August, 1812; from which circumstance (there being no bills of parcels) it is to be inferred that the purchase of the goods was made on that day; whereas the war was known in England, at all events, on the 26th of July preceding, and is stated to have been known in Liverpool on the 18th.

We contend, however, that this property was British, not only until the 13th of August, the time of the purchase, but that it is, at this day, strictly British property under color of an American name.

It does not appear from the record, that the Mary sailed from London to Bristol with a view to the prosecution of the voyage to the United States. But if she did, there was an opportunity for countermanding the

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voyage after it was known that war had been declared; and such countermand ought to have been given. If it might have been, and was not, the doctrine of *putting in motion* does not apply to the present case. The Claimants were clearly *in delicto*, and no presumption can be made in their favor.

This voyage was in violation of the non-intercourse laws of the United States; and on that ground, also, the property is liable to condemnation.

With regard to trading with the enemy, we contend that not only the purchase of hostile goods in the enemy country, but also the payment, in that country, of freight, license and brokerage money, and of the exportation duties, amount to a trading with the enemy; and that every trading with the enemy is illegal. 1 *Rob.* 165, 196, *The Hoop.* *The Juffrow Margaretha*, cited in the same case, *p.* 181, *note*, (*Amr. Ed.*) 4 *Rob.* 191, 232, *The Dree Gebroeders.* Several cases have been thought to favor an opposite doctrine; but the case now under consideration does not, we conceive, come within the principle of any one of them.

The first is the case of the *Packet de Bilboa*, 2 *Rob.* 111, 133. But here, the vessel sailed before the war. The Mary, on the contrary, sailed with full knowledge of the war.

The next case is that of *the Abby*, 5 *Rob.* 251. The same distinction exists here, as in the last mentioned case.

The case of *Bell v. Gilson*, 1 *Bos. and Pul.* 345, has been over-ruled in the case of *Potts v. Bell and al.* 8 *T. R.* 548.

As to the license, it does not appear that any was granted on the 8th of July. The recital of such an one in the subsequent license, is no evidence, The license in question, therefore, although it purports to be a renewal of a former one, is a license *de novo*, obtained with a full knowledge of the war; and is therefore cause of condemnation.

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PINKNEY, *in reply.*

This is neither a case of trade with the enemy, nor of domicil. Visscher had not acquired a British character by either of these means.

It is not a case of *trading* within the opinion of this Court in the case of the *Rapid.* Visscher, the present Claimant, was not domiciled in England. He returned to the United States almost immediately upon hearing of the war. He arrived long before the cargo. The transaction commenced and the goods in question were purchased before the war was or could have been known in England. No criminality can possibly be attached to the transaction; and therefore it cannot be a ground of forfeiture. This is the language of the English decisions on this subject.

It is admitted, that if this enterprize had not been undertaken before knowledge of the war, and if some material part of it had not been actually carried into effect—if it had been entirely a new undertaking, and not with the view of withdrawing funds, it would have been a case within the rule of the law of nations, which prohibits trade with an enemy. But where the goods have been purchased before the war, as here, the case neither comes within that rule, nor within the decisions of the English Court of admiralty. Sir *W. Scott* admits that such goods may be withdrawn. 5 *Rob.* 141, *The Juffrow Catharina.*

But if the Court should be of opinion that this case comes within the general rule prohibiting trade with the enemy, still it will be recollected that that rule admits of relaxation under peculiar circumstances; and we conceive that the circumstances of the present case, if of any, will justify such relaxation. The putting into Waterford cannot, with any reason, be urged against us. That was an act of necessity, and was no discontinuance of the voyage. No new trading with the enemy took place there.

As to the Sydmouth license: It has already been shown that the original license was obtained on the 8th of July, a considerable time before information of the

war reached England. However criminal, therefore, the obtaining such a license might have been in time of known war, in a time of supposed peace it was perfectly justifiable and innocent: it was also absolutely necessary in the present case; the adventure could not have proceeded without a license. The British government was, in fact, bound to give it, by the universal custom of nations. Every nation is under a similar obligation. Our own government has authorized the president to grant such licenses.

But it has been said, that though the obtaining of the first license may be justified in this manner, yet the second, having been procured after knowledge of the war, will not admit of the same justification. Little need be added to what has already been said on this point. The second license was merely a renewal of the first: they are both, indeed, to be considered, but one license. The first having been granted, the second was required, under the circumstances of this case, by the law of nations; or, if not, it was, at any rate, required by good faith. So the British government thought, and so they acted. This case is widely different from those of the *Aurora* and the *Julia*.

With regard to the president's instruction of 28th August, we contend that the Mary comes within both the letter and spirit of that instruction. Her national character is clearly shown by her register and other documents: she is proved to be owned by J. B. Kennedy, of South Carolina: and it is clear that she sailed on the faith of the repeal of the orders in council.

The power of the president to issue instructions to the privateers of the United States, has already been considered. Congress has given him a two-fold power over this part of the armed force of the nation. He is authorized to grant and to revoke their commissions. But *omne majus continet in se minus*: he may therefore grant with limitation, and he may revoke in part. In issuing the instructions in question, he has done nothing more than he had full power and authority to do.

Tuesday, March 15th. Absent....MARSHALL, *Ch. J.*

The Court made the following order:

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It is ordered that the Claimant have leave to make further proof, by affidavits, as to the following points:

1. As to his own citizenship.

2. As to the names of the heirs of general Fisher who are interested in the property, the places of their residence, and their national character.

3. As to the time when Mr. Nanning J. Visscher went to England; the objects which he had in view in going thither; how long he resided there; when the cargo claimed by him was purchased; and when he returned to the United States. And,

4. As to the instructions which the *Paul Jones* had on board at the time of the capture of the Mary; and particularly, whether the instructions of the president of the 28th August, 1812, had been delivered to the captain, or had come to the knowledge of the captain at the time of the capture; or whether the *Paul Jones* had been in port after the 28th of August, 1812, and before the capture.

It is further ordered, that the captors be also at liberty to make further proof as to these several matters.

1814.

Feb. 15th.

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Absent....WASHINGTON, *J.*

The forfeiture of goods, for violation of the non-intercourse act of March 1, 1809, takes place upon the commission of the offence, and avoids a

THIS was an appeal from the sentence of the Circuit Court for the district of Maryland, which restored a quantity of coffee which had been seized and libelled for violating the non-intercourse act of March 1st, 1809, *vol.* 9, *p.* 243, § 4, *&* 5.

The Claimants in the Court below alleged, by way of plea, that the coffee was regularly entered and the duties

secured according to law, after which, they became the purchasers for valuable consideration. They also denied that it was imported contrary to law.

The United States demurred to that part of the plea which states the purchase, &c. and took issue upon that part of the plea which denies the illegal importation. By the sentence of the district Court the demurrer was overruled, and the coffee restored; which sentence was affirmed in the Circuit Court, and the United States appealed to this Court.

subsequent sale to an innocent purchaser, although there may have been a regular permit for landing the goods, and although the duties may have been paid.

The cause was elaborately argued, by the *Attorney General*, PINKNEY, *for the United States*, and by BOYD and HARPER, *for the Claimants*, at last term, and again at this.

The words of the statute, which create the forfeiture, are: "That *whenever* any articles, the importation of "which is prohibited by this act, shall, after the 20th "of **May** next, be imported into the United States," "all such articles" "shall be forfeited."

PINKNEY, *late Attorney General for the United States.*

Two objections have been made to the claim of the United States, for this forfeiture.

1. That the right of the United States does not vest until seizure and condemnation, and

2. That the United States are bound by the act of their officer in receiving the duties and permitting the goods to be entered.

1. The forfeiture occurs at the moment of committing the offence. The statute says *whenever* the act is done, the *thing* shall be forfeited. No other time is mentioned. The seizure is the *consequence* of the forfeiture, not its *cause*. The thing is first forfeited, and then seized. The forfeiture immediately follows the offence. The seizure is merely to ascertain the fact. This is the plain construction, or rather the *letter* of the statute.

There is a distinction between forfeitures at common

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law, and those accruing under a statute. 3 *Cranch*, 351, *United States v. Grundy & al.*

In that case the Ch. Justice said, "Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute." The reason why the Court decided in that case that the right to the ship did not vest in the United States immediately upon taking the false oath, was, that the United States had an alternative, either to take the vessel *or its value*, and until the United States had made their election, the right did not vest.

But there are two cases at common law, where the forfeiture relates back to the time of the offence and avoids intermediate alienations.—*deodand*, and *suicide*. So also in the case of *felony and flight*. So also in all cases where the punishment for the offence is the forfeiture of the thing by which the offence was committed, or where the punishment cannot be inflicted on the person. In treason and felony, the forfeiture of personal chattels is not the punishment but a corollary, or consequence of the disability imposed on the person. But in regard to lands, the forfeiture relates to the time of the offence committed. With regard to purchasers the rule is *caveat emptor*. This is said to be a hard case, but there are other cases equally heard depending on the same rule. If goods are deposited with a merchant to keep, and he sell them, unless in market *overt*, (and we have no market *overt* in this country) the sale is void and the owner may recover them from the purchaser who bought them without notice. This too is a hard case, but it is every days practice.

To show that the forfeiture attaches at the moment of the offence committed, he cited 5 *T. R.* 112, *Wilkins v. Despard*. *Salk.* 223 & 12 *Mod.* 92, *Ribert v. Witherd*. 1 *T. R.* 252, *Lockyer v. Offley*.

2. As to the second point, he said it was impossible to contend that the United States were bound by their officer's ignorance of the fact of the forfeiture when he received the duties and granted the permit.

BOYD, *contra.*

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The demurrer admits that the coffee was properly entered, that the duties were paid, and that there was a *bona fide* sale and transfer of the coffee, for a valuable consideration, before seizure. A forfeiture cannot overreach a *bona fide* sale to third person. That this is the rule at the common law is clearly proved by the very learned and elaborate argument of judge Winchester in giving his opinion in the case of the *Anthony Mangin, (3 Cranch, 356)* and the principle has been recognized by this Court in the same case (3 *Cranch*, 350, *United States v. Grundy and al.*) A forfeiture by statute is not more operative than a forfeiture at common law. There is no expression in the statute to justify the distinction. The common law says whenever a man shall commit treason or felony he shall forfeit his goods and chattels to the king.

Bona fide purchasers are favored at common law. 10 *Ves. jr.* 101, *exparte Edwards*—1 *East*, 94, 95—2 *Esp. N. P. Ca.* 731—12 *Mod.* 92—2 *Cranch*, 390—3 *Cranch*, 356—6 *Cranch*, 133—5 *Bac. ab.* 229. The forfeiture must be followed by seizure and condemnation before the property can vest in the United States. This principle has been decided by this Court in the *St. Domingo cases*, where the law being temporary and having expired after condemnation in the Court below and before hearing in this Court, the property *was restored*, which could not have been the case if the property was vested in the United States by the commission of the offence. If the title of the United States was complete at the time of the offence, and if the seizure was merely to ascertain the fact, the expiration of the law could not divest that title out of the United States, and this Court must have affirmed the sentence of condemnation. *Yeaton and al. v. the United States*, 5 *Cranch*, 281. If the United States had not discovered the offence for three years, the act of limitations would have barred their claim. 2 *Cranch*, 336, *Adams v. Wood*. If the coffee had been destroyed, the United States could not have recovered the duties, because the goods were not legally imported.

2. The United States are estopped from claiming the property by the acts of their officer, in granting the per-

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law, and those accruing under [illegible] of officers are 351, *United States v. Grundy* [illegible] *Officers.* 17 *Vin.* 153.

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The inconveniences of such a rule would be intolerable—the utmost prudence could not prevent a man from loss.

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PINKNEY, *in reply*.

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As to real estate, the relation in treason and felony was to the offence committed—why did not the argument *ab inconvenienti* control the rule in that case? *Plowden*, 260, 290.

In the case of *deodand*—a horse kicks a man: before the man dies the horse is sold—the man dies, the horse is forfeited as deodand.

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The permit to land the coffee, and the receipt for the duties are conclusive evidence to all the world, except the illegal importer, that the coffee was lawfully imported. If a Claimant encourage the vendee to buy, his claim shall be postponed to that of the purchaser. *Sugden on Vendors*, 480. Acceptance of rent is an admission of title. 18 *Vin.* 149. So here acceptance of the duties is an admission of a lawful importation. A purchaser is only bound to use reasonable diligence. He has only to ask whether there be a regular permit to land the goods, and whether the duties have been paid. If the officers were mistaken, and have given evidence of a good title, their mistake ought not to injure an innocent purchaser. 2 *Br. C. C.* 389—5 *T. R.* 118—1 *T. R*, 260—3 *Cranch*, 389, 390.

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Where is the notoriety? The true reason is, that it is a forfeiture of the *offending thing*. In felony, nothing but sale in *market overt* can prevent the relation of the forfeiture to the time of the offence. If *felo de se* give himself a mortal wound, and before his death convey his estate, and die, the conveyance is void. So in the case of flight after felony. The law looks principally to the *thing* for punishment.

The general rule of the law of England is that a purchaser of personal goods is not safe unless he purchased in market overt.

If the United States could be estopped by the acts of their officers, the plea is as good in behalf of the illegal importer as of the innocent purchaser. The purchaser was as much bound to know of the offence as to the collector. But the collector had no authority to waive the penaly, and therefore cannot be *presumed* to have waived it. If he had even given a *release* of the forfeiture it would have been void.

The argument *ab inconvenienti*, is rather an argument *ad misericordiam*. If there be hardship in the case, application should be made to the secretary of the treasury who has power to relieve.

In the St. Domingo cases, the law had expired, without any provision being made to enforce the penalty in existing cases. After the expiration of the law the Court had no authority to condemn; and the appeal annulled the sentence of the Court below.

March 15th. (MARSHALL, *Ch. J. being absent,*)

JOHNSON, *J.* delivered the opinion of the Court as follows:

This case has been argued very elaborately and has been a long time under consideration. But from the decision which the Court has at length come to, its merits are brought within a very limited compass.

We are of opinion that the question rests altogether on the wording of the act of Congress: by which it is

expressly declared that the forfeiture shall take place upon the commission of the offence. If the phraseology were such as, in the opinion of the majority of the Court, to admit of doubt, it would then be proper to resort to analogy and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion. But from the view in which the subject appears to a majority of the Court all assistance derivable from that quarter becomes unnecessary.

It is true that cases of hardship and even absurdity may be supposed to grow out of this decision, but on the other hand if by a sale it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it.

When hardships shall arise, provision is made by law for affording relief under authority much more competent to decide on such cases, than this Court ever can be.

In the eternal struggle that exists between the avarice, enterprize and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offence, the seizure, or the condemnation. In this instance we are of opinion that the commission of the offence marks the point of time on which the statutary transfer of right takes place.

The decree of the Circuit Court of Maryland on the demurrer, is therefore reversed, and the cause remanded that the issue in fact may be tried.

STORY, *J.* The decree which has just been pronounced by a majority of the Court is decisive of the case of the Mars, which is now pending in this Court, and my decision therein must be reversed. The opinion which I there held and the reasons which support it, are disclosed on the record, and though the discussion in this Court has not increased my confidence in that opinion; nevertheless as I am not yet satisfied of its incorrectness, and two

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of my brethren concur in it, I shall make no apology for introducing it in this place.

It is as follows:

The present information proceeds for a forfeiture of the brig Mars upon the allegation that the brig departed from the United States bound to a permitted port without giving bond pursuant to the act of the 1st of March 1809, ch. 91, § 16. There are other counts in the information which I need not now consider, because it is admitted there was a forfeiture under the first count, and the answer of the present Claimant sets up, as a justification of his title, that he is a *bona fide* purchaser for a valuable consideration and without notice of the offence; and it is admitted that this justification is true in point of fact; and that there have been no *laches* either as to the United States, or as to the purchaser.

The question presented to the Court is, whether property, which has become forfeited to the United States, and afterwards, and before seizure, while remaining in the possession of the vendor, is sold to a *bona fide* purchaser for a valuble consideration without notice, is protected against the claim of the United States.

This question is peculiarly delicate and interesting in whatever way it is considered. On the one hand it strikes at the root of almost all the forfeitures *in rem* which the legislature has provided to guard the revenue laws from abuse;—and if the decision be against the United States, it may open a wide field for fraud and colorable transfers, to the encouragement of offenders. On the other hand, if the secret taint of forfeiture be indissolubly attached to the property, so that at any time and under any circumstances within the limitations of law, the United States may enforce their rights against innocent purchasers, it is easy to foresee that great embarrassments will arise to the commercial interests of the country; and no man, whatever may be his caution or diligence, can guard himself from injury and perhaps ruin. Considerations of this nature have pressed heavily upon my mind, and I have therefore been solicitous to avoid a discussion involving so much public as well as private importance. I could have wished to have reserv-

ed this question for the consideration of all the judges in the highest tribunal, that in forming my opinion I might have had the light reflected from their minds, and the benefit of their acknowledged learning. The parties have however seen fit to pursue another course, and I shall meet the question as my duty requires without asking for shelter under any authority; though not without extreme diffidence.

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Before I proceed to the principle question, it will be necessary to clear the way by adverting to some considerations which have grown out of the argument on each side. It should be remembered that this is not a case *where the vendor was out of possession*, and of course where the law might infer a want of due diligence in the purchaser. To such a case the maxim *caveat emptor* would certainly apply. Nor is the present a case where the sale was made at the first moment when the property came within the jurisdiction or grasp of the United States—for I should have little doubt that such a hurried sale could hardly be the foundation of a solid title. It is not a case of voluntary gift or collusive transfer which would probably share the fate of all bounties in fraud or exclusion of public rights. *Jones v. Ashurst. Skin.* 357.

It is admitted that the sale is *bona fide*, for a valuable consideration, and without any express or implied notice. Further, the statute, on which the information is founded, has declared that the property shall be wholly forfeited, if the offence be committed; but it has not declared at what time it shall take effect, to what time it shall relate, nor whether it shall be incapable of being purged by subsequent events. The forfeitures under the statute are to be distributed in the same manner as forfeitures under the collection act of *2d March*, 1799, § 91, by which informers and officers of the customs, as well as the government, may acquire vested interests; and it follows therefore that these interests, as to informers and officers of the customs, cannot vest until their rights are ascertained by seizure or condemnation.

It has been argued on the part of the United States, that the forfeiture is, by the statute, made absolute on the commission of the offence, and as it was competent for the legislature to enact such a law, the title cannot be dives-

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ted by any subsequent event. That the cases of forfeiture at the common law are not applicable because they depend upon the qualification annexed to them by the common law, which makes them conditional only, and not absolute forfeitures, whereas the present statute has annexed no qualification: And in support of this distinction the opinion of the chief justice in the case of *the United States v. Grundy & al.* 3 *Cranch*, 337, has been quoted where he says, (p. 350,) "It has been proved "that in all forfeitures accruing at common law, nothing "vests in the government until some legal step shall be "taken for the assertion of its right; after which, for "many purposes, the doctrine of relation carries back "the title to the commission of the offence, but the dis- "tinction, taken by the counsel for the United States, "between forfeitures at common law and those accruing "under a statute, is certainly a sound one. Where a "forfeiture is given by a statute the rules of the common "law may be dispensed with, and the thing forfeited "may either vest immediately or on the performance of "some particular act, as shall be the will of the legisla- "ture. This must depend upon the construction of the "statute."

I entirely subscribe to the doctrine here stated by the chief justice. There can be no doubt that the legislature may provide that its forfeitures shall take effect differently from the course prescribed by the common law; but the question will always be: Have the legislature so done? If they have not, shall the rules of the common law govern in the absence of any positive declaration? It should be remembered also, that the chief justice is here speaking in a case where the main question before him rested in a considerable degree upon the point whether the legislature had not given an election of remedy, and suspended the vesting of any interest until the determination of that election. But I apprehend that the words of the chief justice by no means imply that when a forfeiture *in rem* is attached to a statute offence, the rules of the common law are of course excluded. They do not in my judgment import more than the opinion which I have already expressed. Now in the case at bar, I cannot perceive in the language of the legislature any systematic exclusion of the common law as to forfeitures. They have declared no more than that the

commission of an act shall induce a forfeiture: and so has the common law; but the question as to the nature and extent of the operation of this forfeiture is no where, that I can perceive touched. This view of the subject leads me to deny another position assumed by the counsel for the United States, viz. that the doctrine of relation has nothing to do with the present controversy. In the progress of this examination, I think, if not already shewn, it will sufficiently appear that the doctrine of relation has a very powerful influence in every essential view of the subject.

I will now consider the main question, which perhaps may be divided into two branches.

1. What is the interest or right which attaches to the government in forfeitures of property before any act done to vindicate its claims?

2. What is the operation of such act done to vindicate its claims; as to the offenders, and as to strangers?

1. As to the first point. In all cases at common law where lands are forfeited for the personal offence of the party, I take the rule to be universally true, that until the offence is ascertained, by conviction and attainder, no title vests in the sovereign.

Before that time the party is entitled to the possession and profits of his lands, and the government have no vested right in them, either to enter or dispose of the estate, 2 *Inst.* 48. *Staund. P. C.* 192. Nay, even after attainder until office found the sovereign is considered as having but a possession in law, and an office is necessary to complete a title. *Staund. P. C.* 198. The offender, therefore, has until conviction full power and authority to alien his lands and to convey to the purchaser a complete and legal, though defeasable seizin; and unless such conviction follow the offence the alienation is good against all the world. For, as Bracton says, (*Lib.* 2, *ch.* 13, *p.* 30.) "ea vero, quæ post feloniam facta sunt, "semper valent and tenent nisi fuerit condemnatio sub-"secuta, et si fuerit subsecuta, non valent.

If this be true, and there seems no reason to doubt it,

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it follows that the estate of the offender is rightful, that he has both *jus ad rem*, and *jus in re*: and consequently that the crown hath but a mere possibility which in no wise restrains the exercise of ownership over the property. *See* 4 *Bl. Com.* 382.

The same doctrine is also, in general, true as to like forfeitures of goods and chattels. *Bract*: *Lib.* 2, *ch.* 18. —*Co. Lit.* 391, *a.*—*Staund. P. C.* 193.—*Id.* 52.—2 *Inst.* 48.—2 *Hawk. P. C. ch.* 49.—Nor do the cases of *deodand*, and *suicide*, form any exceptions, for the authorities all concur that the forfeiture does not vest a property until the fact is found of record. *Foxley's case*, 5, *Co.* 109.—*Hales v. Petit*, *Plowd.* 260, 262. It has been supposed that goods *waived* vested *ipso facto* in the crown upon waiver; but on a careful examination of the authorities it will be found that the owner retains his full property until an absolute seizure by the crown. *Staund. prerog. lib.* 3, *ch.* 25, *p.* 186.—*Fitz. Ab. Estray.* 2. 21 *Edw.* 4, 16. For all purposes of alienation and sale therefore the property in goods and chattels remains in the owner notwithstanding the commission of an offence subjecting it to forfeiture; and consequently he may convey a good title agains every person but the crown, and against the crown also unless in cases where the anterior relation applies. *Jones v. Ashurst*, *Skinn.* 357. I think therefore it may be assumed as a settled principle, that in forfeitures for *personal offences*, before seizure or prosecution, the sovereign has no vested title.

Can the case be distinguished where the forfeiture is made to attach to the *instrument* itself by means whereof the offence is committed?

It seems to me that the most favourable cases for the United States, viz. *deodands* and *waifs*, conclusively shew that no such distinction anciently prevailed, for whatever may be the effect of relation, it is certain that no property vested in the crown until seizure or inquisition. I infer therefore that no absolute property vested in the United States in the case at bar, until actual seizure was made, and the decision in the king's bench in *Lockyer v. Offley*, 1 *T. R.* 252, seems to me fully to support the inference. It has indeed been supposed by the counsel for the United States, that *Roberts v. Witherell*, 1

Salk. 223.—12 *Mod.* 92, *and Wilkins v. Despard*, 5 *T. R.* 112, support a contrary doctrine. But on examination they appear to me to confirm it. In the first, the action, was detinue for property forfeited under the navigation act of Charles 2d, and the Court held that the action will lay, *because the bringing action amounted to a seizure.* In the latter case there had been actual seizure made for the forfeiture, and the sole question was if condemnation were not necessary to divest the property of the owner.

If I am right in the view which I have already taken of the subject, there can be little doubt that the title of the United States so far as affects third persons rests mainly on the doctrine of relation; and that the counsel for the United States must call in the aid of the common law to enforce the present claim. For if no title vests until seizure, there must at the time of seizure be a title in the offending party capable of being divested and of vesting in the United States. But at the time of the present seizure that title had been transferred to the present Claimant and nothing was left in the vendor capable of transfer.

2. This leads me to the examination of the second point, viz. What is the operation of the acts done by the sovereign to vindicate his title by forfeiture?

At common law, in case of attainder for treason or felony the forfeiture *of lands* relates back to the time of the offence committed so as to avoid all intermediate changes and conveyances. 4 *Bl. Com.* 481, 487.—*Co. Lit.* 390, *b. Staund. P. C.* 192, but in general, in like cases the forfeiture of goods and chattels relates back only to the time of *conviction* so that all previous changes and alienations, and even *bona fide* gifts, are protected. 4 *Bl. Com.* 387.—*Co. Lit.* 391. *Staund. P. C.* 192. *Perk.* § 29.—*Skinn.* 357. There are some cases in which the relation is carried back to the time of the inquisition made; but, unless that of suicide form an exception, there is no case where the relation is pressed beyond the time of the prosecution. According to the decision in *Plowden* 260. a *felo de se* forfeits all his goods and chattels, from the time of committing the act which occasions the death: and the doctrine seems to be supported by *Rex v. Ward*, 1 *Lev.* 8. The general ground assigned for it, is, that

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otherwise the offender would go unpunished, and it is compared to the case of flight after felony. Now admitting that this is a solid reason, and a sufficient foundation for a legal adjudication, it may well be doubted if the doctrine, or the decision, in Plowden, required the forfeiture to relate back further than the death of the party.

The case was that sir James Hales, the offender, was joint-tenant with his wife of a term of years; and the question made was whether after inquisition the forfeiture should not relate back so as to over-reach the right of survivorship which accrued to the wife.

Now one of the judges (Weston) held that the forfeiture should only have relation to the death, at which time the title of the wife accrued; yet in this concourse of titles, the king's title by prerogative should be preferred. *Plowd.* 264; and I find that lord Hale (*1 Hale, P. C.* 414) expresses great doubt whether, for all purposes, the relation could be carried back to the stroke which occasioned the death. Be this case as it may, it is the only exception to the general doctrine; and *inter apices juris;* a case so unjust as that which robbed an unfortunate woman not only of the moiety which vested in her by survivorship from her husband, but of the other moiety absolutely vested in her by grant, I am glad to find is a judicial anomaly.

I have said that the case of a *felo de se* forms the only exception to the general rule. There are authorities to show that in case of *flight* for felony, the forfeiture, after it is found by inquisition, verdict, or indictment, relates back to the time of the flight so as to avoid all mesne acts. *Rex v. Wendman, Cro. Jac.* 82. But I think the better opinion, notwithstanding, is that it relates only to the time of finding the flight. *Co. Lit.* 390. *Staund. P. C.* 192, 5 *Co.* 109. *b. Bro. Forfeiture des terres,* 119. *Id. Relation,* 31. But it has been argued that admitting the rule that the forfeiture of goods and chattels *in general* relates back to the time of conviction, yet it is inapplicable to a case where a specific thing is declared forfeited by law, for in such case the *corpus delicti* attaches to the thing in whose hands soever it may come; and the case of deodand, put by counsel, in *Plowden,* 262. is cited in illustration. "If my horse strike a man,

"and afterwards I sell my horse, and after that the "man dies, the horse shall be forfeited." I do not find any authority to support this position, although it is cited as law in 1 *Hawk. P. C. ch.* 26, § 7, and in *terms de la ley, deodand.* It seems a peculiar case growing out of the avarice of the church and the superstition of the laity in ancient times. The distinction seems also countenanced by the Court in *Lockyer v. Offley*, 1 *T. R.* 252. The counsel for the Plaintiff there argued that the ship was forfeited the moment the smuggling was committed, even though she had afterwards come into the hands of a *bona fide* purchaser; and Mr. justice Willes in delivering the opinion of the Court, in alluding to the argument that the forfeiture attached the moment the act was done, said, "it may be so as to some "purposes, as to prevent intermediate alienations and "incumbrances." To be sure this expression carries with it a pretty strong implication; but in the same case, returning to the argument, the same learned judge says, "I do not know that it has been ever so decided— "it may depend upon circumstances, such as length of "possession, laches in seizing or other matters." And the decision of the Court went ultimately upon other grounds. I must, therfore, consider the authority as not fairly extending to this point, and indeed as rather leaning the other way. On the other hand, the case of Lord and villain has been cited from *Co. Lit.* 118, § 117, to show that even where a right to seize property exists in the Lord, it is not perfected by seizure so as to over-reach prior alienations; for until seizure it is said that he has neither *jus in re*, nor *jus ad rem*, but a mere possibility. And the conclusion drawn from this example is not materially affected by the consideration that a contrary doctrine prevails in the case of the sovereign, (*Id.* § 118) because the reason assigned is perfectly consistent with it; viz. that the property *is in the sovereign* before any seizure or office. I do not think much reliance can be placed upon analogies borrowed from the feudal tenures, because they were governed by peculiar and technical nicetics, the reasons of which have long since ceased, and perhaps cannot now be well understood. But if the principle of the case put be that where the absolute property *is not vested before the alienation*, a subsequent seizure will not avoid such alienation if made *bona fide*, it is directly applicable to the case at bar.

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I have already endeavored to show that the absolute property did not vest in the United States until seizure; and I think it would be a bold assertion that the United States could, before such seizure, have conveyed the property to a purchaser, or have clothed it with a national character. I consider a passage in lord Hale's treatise on the customs as corroborating the view which I have already taken of this case. He says, "Though "a title of forfeiture be given by the lading or unlading, "the custom not being paid, *yet the king's title is not "complete, till he hath judgment of record to ascertain his "title*, for otherwise there would be endless suits and "vexations; for it may be ten or twenty years hence "that there might be a pretence of forfeiture now in-"curred." *Harg. Law tracts, 226.* According to lord Hale even seizure would not be sufficient to fix the title in the king; but it must be consummated by a judgment of record.

But the point of difficulty is to decide whether the United States had not such an *inchoate* title as, connected with a subsequent seizure, would, by a retroactive effect, defeat the intermediate purchase. Now it is precisely in this view that the case of villain may admit an unfavorable distinction; for until seizure the Lord has not even an *inchoate* title, but a mere possibility. And though the property is in the like case of the sovereign said to be in him without seizure or office, yet I apprehend the title is not consummate until seizure or office; for until that time it could hardly be held that a purchaser under the villain, or even the villain himself had a tortious possession and use of the property. The case of villenage then, even supposing it to apply, does not go *quatuor pedibus* with the present. The case of *Attorney General v. Freeman, Hard.* 101, has also been relied on by the Claimant. In that case the party, after outlawry and before inquisition, made a *bona fide* lease of his lands; and it was held that the forfeiture did not over-reach the title of the purchaser.

But I do not think that much reliance can be placed on this case, because it turned on a settled distinction that until inquisition the king has no title in the real chattels or freehohls of the outlaw; but in personal chattels the title is in the king without inquisition. 1

Ld. Ray. 305. *Salk.* 395. 12 *Mod.* 176. And the relation does not extend beyond the time of the commencement of the title. The case of the *Anthony Mangin*, 3 *Cranch*, 356, *n.* before Mr. justice Winchester, is the only other authority that I recollect, which has been thought materially to bear upon the question. I entertain the most entire respect for the opinions of that truly able and learned judge: and although the decision of that case did not rest upon the present question, it is but justice to acknowledge that it has thrown great light on the subject, and enabled us all to meet the stress of this cause with more certainty than could otherwise have been done. It was very clearly the opinion of the learned judge that a seizure did not relate back to the time of forfeiture so as to over-reach an intermediate *bona fide* conveyance; and he has certainly offered cogent reasons in support of that opinion. But after a diligent examination of the authorities cited by him, I am well satisfied that the point has never been solemnly adjudged, and must now be decided upon principle.

It seems to be a rule founded in common sense, as well as strict justice, that fictions of law shall not be permitted to work any wrong, but shall be used *ut res magis valeat quam pereat*, 3 *Rep.* 28, *b.* and this rule, so equitable in itself, seems recognized in the common law. 13 *Rep.* 21. 2 *Vent.* 200. And in respect to the doctrine of relation, this rule has been admitted in its fullest extent in civil cases. *Bro. Relation*, 18. 1 *H.* 7, 17. *Bro. Debt*, 139. 6 *Rep.* 76, *b.* 3 *Rep.* 28. *b.* For it has been repeatedly adjudged that relations shall never work an injury, "and shall never be strained to "the prejudice of a third person who is not a privy or "a party to the act:" and further, that "in destruction "of a lawful estate vested, the law will never make any "fiction." 3 *Rep.* 29. 2 *Vent.* 200.

It is true, as we have already seen, that a different rule prevails as to forfeitures of lands in treason and felony, founded probably on feudal principles, or the barbaric character of the times; yet even as to cases of treason and felony a striking distinction is admitted in favor of goods and chattels; and mesne acts before conviction or inquisition are suffered to retain their actual validity.

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Looking to the vast extent of commercial transfers, the favor with which navigation and trade are fostered in modern times, and the extreme difficulty of ascertaining latent defects of title, it seems difficult to resist the impression that the present is a case which requires the application of the milder rule of the law.

If the principle contended for by the government be admitted in its full extent, it will be found very difficult to bound it. A bale of goods which is once contaminated with a forfeiture will retain its noxious quality through every successive transfer, even until it has assumed under the hands of the artizan its ultimate application to domestic use. Yet such a position would strike us all as monstrous. If we say that the forfeiture shall cease with the change of the identity of the whole package, as such, still an intrinsic difficulty remains. The object of the government would be completely evaded by the offender, and the innocent purchaser would sink under the pressure of frauds which he could never know, nor by diligence avert.

On the whole I have come to the result, not however without much diffidence of my own opinion, that a forfeiture attached to a thing, conveys no property to the government in the thing, until seizure made or suit brought. That previous to that time the owner has the exclusive right of possession and property, though the government may be considered as having an inchoate title, or possibility. That against the offender or his representatives, upon seizure or suit, the title by operation of law relates back to the time of the offence so as to avoid all mesne acts; but as to a *bona fide* purchaser for valuable consideration and without notice of the offence, the doctrine of relation does not apply so as to divest his legitimate title.

Considering, as I do, that this question is of very great importance, I trust that it will receive the decision of the highest tribunal; and I shall not feel humbled, if upon better examination a different doctrine shall prevail by the judgment of that Court. I do therefore adjudge and decree that the decree of the District Court in the premises be affirmed.

THE UNITED STATES
v.
THE BRIGANTINE MARS.

1814.
March 15th.

THIS was an appeal from the sentence of the Circuit Court of Massachusetts district, which affirmed the sentence of the district Court, restoring the brig to the Claimants.

A forfeiture under the 3d section of the act of 28th June, 1809, ch. 9, will over-reach a bona fide sale to a purchaser for valuable consideration without notice of the offence.

An information was filed against the brig Mars, for a breach of the act of 28th of June, 1809, (entitled "An "act to amend and continue in force certain parts of "the act, entitled an act to interdict the commercial in- "tercourse," &c.) in departing from port without having given bond according to the 3d section of the act, which provides that "if any ship or vessel shall, contrary to "the provisions of this section depart from any port "of the United States without clearance, or without "having given bond in the manner above mentioned, "such ship or vessel, together with her cargo, shall be "wholly forfeited."

The vessel, after her return to the United States, and before seizure, was *bona fide* purchased by the Claimants, for a full and valuable consideration without notice of the offence. Upon this ground she was by the decree of the district Court ordered to be restored; which decree was affirmed by the Circuit Court. Judge Story's opinion in pronouncing that decree, will be found in the preceding case of the *United States* v. 1960 *bags of coffee.*

This case having been submitted upon the arguments which were had in that case,

JOHNSON, *J.* delivered the opinion of the Court as follows:

"This case depends upon the principle established in the case against the coffee, the Bohlens, Claimants.*

* The case of the United States v. 1960 bags of coffee, ante p. 398.

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The decision, as in that case, was founded upon the ground of a sale to a *bona fide* purchaser without notice.

The decree of the Circuit Court of Massachusetts district, in this case is therefore reversed, and the Brigantine Mars adjudged forfeited to the United States."

THE FRANCES, BOYER, MASTER.

(Irvin's claim.)

No lien upon enemy's property, by way of pledge for the payment of purchase money, or otherwise, is sufficient to defeat the rights of the captors, in a prize Court, unless in very peculiar cases where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Where goods are sent upon the account & risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to

THIS was an appeal from the sentence of the Circuit Court of Rhode Island, condemning certain British goods captured on board the Frances. These goods were claimed by Thomas Irvin, a domiciled merchant of the United States, on the ground of *lien*.

IRVING. *for Appellant.*

PINKNEY, *for Captors.*

*Tuesday, March 15th. Absent....*MARSHALL, *Ch.* J.

WASHINGTON, *J.* delivered the opinion of the Court as follows:

Thomas Irvin is a merchant of New York, and claims certain packages of merchandize consigned to him by Robertson and Hastie, and also three boxes of merchandize consigned to him by Pott and M'Millan. The consignors were British subjects, residing in Great Britain at the time that these goods were shipped, which, according to the terms of the bills of lading, were on account and risk of the shippers.

It is not pretended that the real ownership in these goods was not vested in the consignors, enemies of the United States; but the Claimant founds his pretensions on a lien created on the goods consigned by Robertson and Hastie, in consequence of an advance made to the shippers, in consideration of the consignment, by his

agent in Glasgow; and on the goods shipped by Pott and M'Millan, in virtue of a general balance of account due to him as their factor. To establish these claims in point of fact, an order for further proof is asked for, and the question is, whether, if proved, the claim can, in point of law, be sustained?

countermand it, and thus to prevent the consignee's lien from attaching.

The doctrine of *liens* seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. The consignor or owner cannot maintain an action against his factor, to recover the property so placed in his possession, without first paying or tendering what is thus due to the factor. But this doctrine is unknown in prize Courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. *Abbott on Shipping*, 184. It is, to use the words of sir *W. Scott*, "an interest directly and "visibly residing in the substance of the thing itself." The possession of the property is actually in the owner of the ship, of which, by the general mercantile law of all nations, he cannot be deprived until the freight due for the carriage of it is paid. He has, in fact, a kind of property in the goods by force of this general law, which a prize Court ought to respect and does respect. On the one hand, the captor, by stepping into the shoes of the enemy owner of the goods, is personally benefited by the labor of a friend, and ought, in justice, to make him the proper compensation: and on the other, the ship owner, by not having carried the goods to the place of their destination, and this, in consequence of an act of the captor, would be totally without remedy to recover his freight against the owner of the goods.

But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and

THE FRANCES, (IRVIN'S CLAIM,) BOYER, MASTER.

even upon the prize Courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral Claimants, have excluded such cases from the consideration of those Courts. In the case of the *Tobago*, 5 *Rob.* 196, where an attempt was made by a British subject, to set up a bottomry interest on an enemy's ship, sir *W. Scott* observed, that no precedents to sanction such a claim could be produced: and he very properly concluded, that this was strong evidence that it had not been the practice of the Court to consider such bonds as property entitled to its protection. And it seemed to be conceded, that, upon the same principle, the captor could not entitle himself to the advantage of such liens, existing in an enemy, upon neutral property. From this it appears that the doctrine of the prize Courts upon this subject, works against as well as in favor of captors. The case of the *Marianna*, in 6 *Rob.* avoids all the objections made to the application of the case of the *Tobago* to the present. It is precisely in point.

The principal strength of the argument in favor of the Claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the Claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the Court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the Court below must be affirmed with costs.

LIVINGSTON, *J.* I differ in opinion from the majority of the Court. Irvin had a lien on the goods, apparent on the face of the papers. I have no difficulty in condemning the property subject to that lien; but I cannot assent to an unqualified condemnation.

THE THOMAS GIBBONS, ROCKWELL, MASTER.

THIS was an appeal from the decree of the Circuit Court for the district of Georgia.

The ship *Thomas Gibbons* sailed from Liverpool for Savannah, on the 16th of August, 1812, was captured on the 12th of October following, on the high seas, off Tybee light house, and, the same day, brought into the port of Savannah as prize to the privateer Atas.

The ship and cargo were under the protection of a special license, dated 21st July, 1812, and conceived in the usual terms of the document usually denominated the *Sidmouth license*, except that, in this instance, the protection was extended to the return voyage back to Liverpool, there to discharge the cargo, and receive freight, if it should be found not to be allowable for the vessel and cargo to enter the ports of the United States.

The clearance from Liverpool, 13th August, 1812, mentioned the ship as being released, in consequence of her license, from an embargo laid on American vessels.

The cargo, shipped at Liverpool by sundry British merchants, was consigned to sundry commercial houses at Savannah, and was claimed by the respective consignees; by some, in their own behalf, and by others, in behalf of their correspondents in the interior.

From the evidence introduced into the cause, it appeared that part of the goods, although expressed to be on account and risk of the consignees, was shipped without previous orders or authority: that some of them were shipped under general orders (transmitted in time of peace) to ship goods: others, under particular orders given during the operation of the orders in council and the non-intercourse act; such as, to ship "when the trade opened," "at a proper season," "as soon as it was legal to ship to the United States," &c. and lastly, that some of them were shipped with an understanding that they were to become the property of the *citizen consignee upon arriving* at the port of destination.

Under the 8th section of the prize act of June 26th, 1812, the president had full authority to issue the instruction of 28th August, 1812. The commissions of the privateers of the U. States may be qualified and restrained by the instructions of the president. A shipment made, even after a knowledge of the war, is to be considered as having been made in consequence of the repeal of the orders in council, if made within so early a period thereafter as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities on the part of the U. States. By the mere act of illicit intercourse the property of a citizen is not divested ipso facto. it is only liable to be condemned as enemy property, or as adhering to the enemy, if right-

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The commission of the *Atlas* was granted on the 24th of September, 1812, and was accompanied by a copy of the president's instruction to privateers, of the 28th of August, 1812, by which the public and private armed vessels of the United States are directed not to interrupt "any vessels belonging to citizens of the United "States coming from British ports to the United States "laden with British merchandize, in consequence of the "alleged repeal of the British orders in council."

fully captured during the voyage.

The president's instruction of 28th August 1812, was meant to protect all British merchandize on board an American ship, without any exception on account of British proprietary interest.

JONES, *for the captors,*

Contended that the ship and cargo were enemy property.

I. Constructively so, by the maritime law of nations, according to which law the hostile character is impressed.

1. By being placed, by the enemy's pass or license, *infra præsidium hostis*; and by the *employment and course of traffic.* 1 *Rob.* 10, 11, *The Vigilantia.*

2. By direct trading with the enemy, *flagrante bello.*

II. Actually so, with regard to a great proportion of the cargo, according to the principles of municipal law, as recognized and acted upon by prize Courts, in administering the maritime law of nations; according to which,

1. Goods shipped without previous orders or authority, although expressed to be on account and risk of the consignee, continue the property and at the risk of the *enemy shipper,* until accepted by the *citizen consignee.*

2. General orders (transmitted in time of peace) to ship goods, are, *ipso facto,* superseded, if war intervene and render the act *unlawful* as well as *dangerous.*

3. Particular orders (given during the operation of the orders in council and the non-intercourse act) to ship "when the trade opened," or "at proper seasons," or "as soon as it was legal to ship to the United

States," could not authorize a shipment, merely upon the conditional revocation of the orders in council, whilst the American non-intercourse act continued in force: *a fortiori* if war should supervene.

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4. The proprietary interest in goods shipped with an understanding that they are to become the property of the *citizen consignee, upon arriving* at the port of destination, continues in the *enemy shipper* until arrival and delivery, without regard to the terms in which the consignment is ostensibly made. 2 *Rob.* 111, *The Packet de Bilboa.*

That, therefore, goods captured *in itinere*, under either of the foregoing predicaments, were to be treated as the property and at the risk of the shipper, and as partaking of his national character.

The principal question, he said, which would now be agitated was, whether the instruction of the president of the United States to American privateers, of 28th August, 1812, extended to the case now under consideration. He contended that it did not: or if it did, that it could not legally avoid the capture, nor in any manner affect the rights of the captors, *quoad* the prize in question, but could only be enforced (as originally intended) by the exercise of executive discretion and authority over the *commission* of the privateer. That, according to the decision in the case of the Sally, *that the prize act operates as a grant from the United States to the captors*, the president could not deprive them of their rights under that act. That the power of the president to instruct must be limited by the rights so granted to the captors. That the authority with which he was invested by congress, was only given him to regulate the *conduct* of our privateersmen, and to prevent abuses—not to limit their rights already vested. That he had no general authority to limit the rights of war, as was clear from the passage of particular acts of congress investing him with the respective powers of removing British subjects, of giving licenses to depart, &c. which would have been wholly unnecessary had he possessed a general power over these matters. That the position contended for, was further supported by the terms employed in the third section of the prize act, in which the owners, &c. of privateers are required to give bond

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to the United States that they will observe "the instructions which shall be given them *according to law*, for the *regulation of their conduct*:" also by the letter of the secretary of state (Mr. Monroe) to Mr. Russell, of August 31st, 1812, written under the eye of the president, in which the secretary says, that it was not in the power of the president to control the privateers, except by an indiscriminate revocation of their commissions. But,

2. That, admitting the power of the president to issue the instruction under consideration, the present case was not embraced thereby. That the property in question, having been shipped after a full knowledge of the war, could not be considered as shipped in consequence of the alleged repeal of the orders in council. That the only time in which the shipments contemplated by the instruction, could be made, was that which intervened between the repeal of the orders in council and the knowledge of the declaration of war; after which it was unreasonable to calculate on the safety of property shipped for the United States. That the ship, also, was not within the description of vessels intended by the instruction to be exempted from capture, because she was engaged in an illicit intercouse with the enemy, under an enemy passport issued after the knowledge of the war in England, and was therefore *quasi* enemy property. That, at all events, the property intended to be protected, by the instruction from capture, was *American* property, and not *British*, and therefore that, as to the latter, the capture was certainly rightful.

HARPER, *contra*.

It has been said, on the part of the captors, that the president had no authority to issue the instruction of 28th August, either on general principles, or under the prize act. We contend that his authority to issue it, may be established on either of these grounds.

1. On general principles. The president, as commander in chief of the army and navy of the United States, has, in time of war, the whole public armed force of the nation under his control. The privateers of the United States constitute a part of the public arm-

ed force: this appears from their commissions, without which they would be pirates. On general principles, therefore, the president was authorized to issue the instruction in question.

2. By the 8th section of the prize act, the president is authorized to establish and order suitable instructions for the better governing and directing the conduct of the privateers of the United States. Now this "governing and directing" their conduct, we conceive, may be applied as well to the designation of the objects of hostility as to the mode of attack, &c. It is applicable, in our opinion, to their whole conduct.

But it is contended, that the present case is not embraced in the instruction. It is said that the ship did not sail in consequence of the repeal of the orders in council. What, then, we would ask, was the motive for sailing at the particular time this vessel sailed? What could have induced the master to sail after knowledge of the war, but a confidence that the repeal of the orders in council would have put a period to hostilities? It is well known that such a confidence did exist among the merchants in England generally, and that it continued until it was ascertained in that country that the repeal of the orders had not produced the expected effect. The act of congress of 2d January, 1813, remitting certain fines, forfeitures, &c. has fixed upon the 15th of September as the period when it was known in England that this effect had not been produced. This vessel sailed on the 16th of August preceding. We insist, therefore, that notwithstanding the existence of hostilities was known in England at the time the Thomas Gibbons sailed, yet she sailed in consequence of the repeal of the orders in council.

The expression in Mr. Munroe's letter of 31st August, was probably accidental—certainly incidental, and not a particular object of the letter.

The expression, *British merchandize*, in the instruction of 28th August, was not intended to designate the *right* of property, but the *kind of goods*. It was the policy of Government to protect British as well as Ameri-

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can property shipped under the particular circumstances mentioned in the instruction.

PINKNEY, *on the same side.*

The president cannot coerce the privateers of the United States to do what he pleases, but he may *restrain* them, as he thinks proper.

It has been said that the license under which this vessel sailed, was issued after knowledge of the war in England. This must be a mistake:—it is dated on the 21st of July, 1812, when the war was not known in England; and it is to be presumed that it was issued at the time it bears date. Being issued, therefore, before knowledge of the war, it does not give a hostile character to the vessel.

HARPER. The property is vested in the captors only when *legally taken*, it is vested *sub modo*.

STORY, *J.* That is the rule as laid down in the opinion of the Court delivered this morning in the case of the *Sally*: The prize act vests only property lawfully captured.

JONES, *in reply.*

The captors may be punished, if guilty; but the captured property must vest in them notwithstanding. The instruction applies only to American vessels: but the license, we still contend, gave the vessel in question a hostile character.

Where the instruction speaks of British merchandize, the meaning is, British merchandize belonging to *American citizens*. This construction is consistent with all the acts of congress on the subject, especially the act of 2d January, remitting forfeitures, &c. It is consistent also with Mr. Russell's declarations to the British merchants. *See 2d vol. of reports of committees, p. 30.*

Wednesday, March 16th.

Absent MARSHALL, *Ch. J. and* JOHNSON, *J.*

STORY, *J.* delivered the opinion of the Court.

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The ship *Thomas Gibbons*, laden with a cargo of British manufactures, on account of British and American merchants, sailed from Liverpool, in Great Britain, on the 16th August, 1812, bound for Savannah, in Georgia, and was captured on the 12th of the ensuing October, on the high seas, off Tybee light-house, by the private armed vessel *Atas*, Thomas M. Newhall, commander, and, on the same day brought into Savannah as prize of war. The ship sailed from Liverpool, under the protection of a special license, dated the 21st of July 1812, granted by lord Sidmouth, by order of the privy council, whereby the ship and cargo were protected from British capture, not only on the voyage to the United States, but also on the return voyage to Liverpool, in case the master should not be permitted to land the cargo in the United States; and the master was further allowed, in case of return, to receive his freight, and proceed in ballast to any port not blockaded.

The commission of the Atas was granted on the 24th of September, 1812, accompanied by a copy of the president's instruction of the 28th of August, 1812.

A libel was filed in the District Court of Georgia, upon which regular proceedings were had against the ship, as prize of war. The respondents interposed their claims and the district attorney also interposed a claim in behalf of the United States. At the hearing, the district Court dismissed the libel of the captors, and upon appeal, the decree was affirmed in the Circuit Court.

The principal question which has been moved at bar, is, whether the capture of the ship was lawful: and that depends upon the authority of the president to issue that instruction, and upon the true construction of it, if rightfully issued.

As to the authority of the president, we do not think it necessary to consider how far he would be entitled, in his character of commander in chief of the army and navy of the United States, independent of any statute provision, to issue instructions for the government and direction of privateers. That question would deserve grave consideration; and we should not be disposed to entertain the discussion of it, unless it become unavoidable. In the

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case at bar, no decision on the point is necessary; because we are all of opinion that, under the eighth section of the prize act of 1812, ch. 107, the president had full authority to issue the instruction of the 28th of August. That section provides, that the president shall be authorized "to establish and order suitable instructions for the better governing and directing the conduct" of private armed vessels commissioned under the act, their officers and crews. The language of this provision is very general, and in our opinion it is entitled to a liberal construction, both upon the manifest intent of the legislature, and the ground of public policy.

It has been argued, that privateers acquire by their commissions, a general right of capture under the prize acts, which it is not in the president's power to remove or restrain, while the commission is in force; that therefore his right to issue instructions must be construed as subordinate to the general authority derived from the commission; and that, in this view, his instructions should extend only to the internal organization, discipline and conduct of privateers.

We cannot, on mature deliberation, yield assent to this argument. It is very clear that the president has, under the prize act, power to grant, annul and revoke, at his pleasure, the commissions of privateers; and by the act declaring war, he is authorized to issue the commission in such form as he shall deem fit. The right of capture is entirely derived from the law: It is not an absolute, vested right which cannot be taken away or modified by law: It is a limited right, which is subject to all the restraints which the legislature has imposed, and is to be exercised in the manner which its wisdom has prescribed. The commission, therefore, is to be taken in its general terms, with reference to the laws under which it emanates, and as containing within itself all the qualifications and restrictions which the acts giving it existence have prescribed. In this view, the commission is qualified and restrained by the power of the president to issue instructions. The privateer takes it subject to such power, and contracts to act in obedience to all the instructions which the president may lawfully promulgate.

Public policy, also, would confirm this construction.

It has been the great object of every maritime nation to restrain and regulate the conduct of its privateers: They are watched with great anxiety and vigilance, because they may often involve the nation, by irregularities of conduct, in serious controversies, not only with public enemies, but also with neutrals and allies. If a power did not exist to restrain their operations in war, the public faith might be violated, cartels and flags of truce might be disregarded, and endless embarrassments arise in the negotiations with foreign powers. Considerations of this weight and importance are not lightly to be disregarded; and when the language of the act is so broad and comprehensive, we should not feel at liberty to narrow or weaken its force by a construction not pressed by the letter, or the spirit, or the policy of the clause. On the whole, we are all of opinion that the instruction of the president of the 28th of August, is within the authority delegated to him by the prize act.

But it is argued, that, admitting its legal validity, this instruction cannot protect the ship and cargo from capture as prize of war, because the cargo was shipped after a full knowledge of the war, and not "in consequence of the alleged repeal of the British orders in council."

We are of a different opinion. We think that a shipment made even after a knowledge of the war, may well be deemed to have been made in consequence of the repeal of the orders in council, if made within so early a period as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities, on the part of the United States. Congress have evidently acted upon this principle; and have themselves fixed the time, (the 15th of September, 1812.) before which, shipments might be reasonably made upon the faith of that presumption. *Act of 2d January* 1813. *ch.* 149. We are not inclined to hold a less liberal construction in favor of the acts of individuals proceeding from a confidence in the avowed intentions of the government.

It is further argued, that the ship was not within the description of vessels intended by the instruction to be exempted from capture, because she was engaged in an illicit intercourse with the enemy, under an enemy passport, and therefore was *quasi* enemy property. We

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cannot assent to this argument. The vessels exempted from capture are "vessels belonging to citizens of the United States, coming from British ports to the United States." The ship, in this case, was duly documented as an American, was coming to the United States, and from a British port. How can it be possible to bring a case more perfectly within the terms of the description? The argument proceeds upon the supposition that by the mere act of illicit intercourse, the property of an American citizen becomes divested *ipso facto*; but, in point of law, this is not the operation of the rule. The property is only liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage. But it has never been supposed that the documentary character of the ship itself, or the character of the owner, were completely changed for every other purpose. It is sufficient, however, in our opinion, that no such distinction as that assumed in the argument, is to be found in the instruction itself; and we therefore hold the case within the natural and ordinary import of the language.

It is further argued, that, at all events, the property intended to be protected by the instruction from capture, was American property, and not British property; and therefore that, as to the latter, the capture was rightful. This is a question of some difficulty; but, on full consideration, a majority of the Court are of opinion that the instruction meant to protect all British merchandize on board an American ship, without any exception on account of British proprietary interest. It was supposed that British as well as American merchants might, upon the repeal of the orders in council, be induced to make shipments, upon the faith that such repeal would suspend the further operations of hostilities. The government meant to reserve to themselves the ultimate disposal of such property, in order that they might restore or condemn it, as public policy or the national interests might require. This construction is supported and confirmed by the act of congress, of 13th July, 1813, ch. 10, which, after relinquishing all the right and title of the United States, to the property of British subjects, captured on the high seas and shipped from British ports since the declaration of war, expressly excepts such property as had been captured in viola-

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tion of the presidents instruction of the 28th of August, 1812. In giving this construction, therefore, we are satisfied that we conform to the import of the language of the instruction, and do not contravene any policy avowed by the government itself.

On the whole, we are of opinion that the decree of the Circuit Court, dismissing the libel of the captors, ought to be affirmed, and that the cause should be remanded to the Circuit Court for further proceedings as between the United States and the Claimants.

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1814. March 16th.

ERROR to the Supreme Judicial Court of Massachusetts, in an action of trover in which was involved the construction of the acts of congress, giving to the United States a right of priority in payment of the debts due by insolvent debtors.

In case of insolvency, the United States are not entitled to priority of payment, unless the insolvency be a legal and known insolvency manifested by some notorious act of the debtor pursuant to law.

The case was submitted to the Court without argument, and is fully stated in the opinion which was delivered as follows, by

DUVALL, *J.*

The material facts upon the record are these:

On the 4th of June, 1810, sundry goods, wares and merchandize, the property of Wellman and Ropes, were attached by the deputy of Bailey Bartlett, sheriff of the county of Essex, state of Massachusetts, by virtue of certain writs of attachment sued out by several creditors of Wellman and Ropes.

On the 18th day of September, 1810, two several executions issued on judgments recovered by the United States against Wellman and Ropes, at the September term, 1810, of the district Court held at Salem, on their joint and several bond for duties at the custom house. The actions in which these judgments in favor of the United States were rendered, were first commenced on

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the day of August, 1810; but no attachment of property was made thereon;—on the 19th day of September following, two suits of attachment, in favor of the United States, one against Wellman and one against Ropes, issued in due form of law, directed to the marshall of the district or his deputy returnable to the district Court to be held in December then next ensuing.

On the 11th of October, in the same year, the goods, wares and merchandize beforementioned being in custody of Bartlett a sheriff of the county, and in a store hired by him for the purpose, Sprague, one of the Appellants, and deputy of Prince, the marshal, after the refusal of the sheriff to open the store, forcibly broke into it and seized, attached and conveyed away the property which had been attached by the sheriff in the manner before stated, by virtue of the executions and writs of attachment in behalf of the United States and disposed of it in satisfaction of the judgments.

Wellman and Ropes continued in business until the aforesaid 4th day of June, and then failed; and then were and ever since have continued to be debtors unable to pay their debts. Wellman has continued at his usual place of abode in Salem ever since his failure, and has not for any whole day confined himself within his house, but has sometimes kept his person within doors, and had his doors fastened, and occasionally used other vigilance and caution to avoid any arrest of his person for two or three weeks next following the said 4th day of June, but has never been arrested by any officer, or pursued for that purpose: Ropes has always continued at large in Salem, and has never confined or concealed himself from his creditors at any time.

An action of trover was commenced by Bartlett, the sheriff, for the property by him attached as aforesaid, against Prince and Sprague, who had thus forcibly dispossessed him of it, in the Court of common pleas in Essex county, where, upon trial, judgment was rendered in favor of the Defendants. An appeal was prayed and granted to the Supreme Judicial Court of the commonwealth of Massachusetts, and at November term 1811, the cause came on to be tried upon the facts before stated. Upon the plea of not guilty and issue,

the counsel for Prince and Sprague insisted that the several matters so alleged and proved in evidence on their part was sufficient to maintain the issue on their part, and to bar the Plaintiff of his action. This was denied by the counsel for the Plaintiff, and the judge who sat on the trial delivered his opinion to the jury, that the several matters produced and proved on the part of the Defendants, were not upon the whole case sufficient to maintain the issue on the part of the Defendants, and to bar the Plaintiff of his action. With this direction the jury found a verdict for the Plaintiff, and $10,240. 69 damages.

To this opinion of the Court an exception was taken and the proceedings removed by writ of error to this Court.

The sole question for the consideration of this Court is whether the priority to which the United States are entitled by law, attaches in this case.

This priority is given by the 5th section of the act of the 3d of March, 1797, ch. 74. It is also given by the 65th section of the collection law in the words following: "and in all cases of insolvency, or where any estate in the hands of the executors, administrators or assigns shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds shall be first satisfied." In the same section the legislature explain their meaning of insolvency by declaring that it shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed.

At present there is no existing bankrupt law in the United States; but in many of the states provision is made by law for the relief of insolvent debtors. In the act of congress of the 4th of August, 1790, the word *insolvency* only is used. In the acts lately passed on the same subject the words *insolvency* and *bankruptcy*

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are both adopted and appear to be used as synonymous terms.

It is admitted that the property seized by the attachments and executions before stated was insufficient to satisfy the several claims exhibited, and that Wellman and Ropes were unable to pay their debts, but it does not appear that their property was attached as the effects of *absconding*, *concealed* or *absent* debtors; nor does it appear, or is it even alleged that they or either of them have made a voluntary assignment of their property for the benefit of their creditors; nor is it alleged that either of them has committed an act of legal bankruptcy. It appears to be the true construction of the act to confine it to the cases of insolvency specified by the legislature. Insolvency must be understood to mean a legal and known insolvency manifested by some notorious act of the debtor pursuant to law: not a vague allegation, which, in adjusting conflicting claims of the United States and individuals, against debtors it would be difficult to ascertain.

The property in question being in the possession of the sheriff by virtue of legal process, before the issuing the writ on behalf of the United States, was bound to satisfy the debts for which it was taken; and the rights of the individual creditors thus acquired could not be defeated by the process on the part of the United States subsequently issued.

The Court is of opinion that priority does not attach in this case, and that there is no error in the judgment of the Supreme Judicial Court of the commonwealth of Massachusetts.

Judgment affirmed.

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A vessel sailing to an enemy's country

THIS was an appeal from the sentence of the United States Circuit Court for the district of New Hampshire,

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after knowledge of the war and taken bringing from that country a cargo consisting chiefly of enemy goods is liable to confiscation as prize of war. Suppression of papers, where it appears to have been intentional and fraudulent, and attended with other suspicious circumstances, is good cause for refusing further proof. But where the suppression appears to be owing to accident or mistake and no other suspicious circumstances appear in the case—further proof may be allowed.

The material facts of the case were as follow:

The ship *St. Lawrence*, Silas Webb master, was captured, on the 20th of June 1813, by the private armed vessel *America*, and, with her cargo, libelled as prize, in the District Court of New Hampshire. On the proceedings which were had there, it appeared that the St. Lawrence, owned by Robert Dickey of New York, and Hugh Thompson of Baltimore, arrived at Liverpool from Sweden in April 1813, with a cargo of iron and deals. In the month of May 1813, the agent of Dickey and Thomson entered into a contract for the sale of the St. Lawrence, with the house of Ogden, Richards and Selden of Liverpool, the contract to be ratified or disaffirmed by Dickey and Thompson, and the bill of sale to be executed by them, in case of affirmance, to Andrew Ogden and James Heard of New York, or either of them. On the 5th of May 1813, a license was granted by the privy council of Great Britain to Thomas White, of London, and others, permitting them to export, direct to the United States, an enumerated cargo in the St. Lawrence, provided she cleared out before the last day of that month. On the 30th of May 1813, she sailed from Liverpool for the United States, with the cargo specified in the license. Mr. Alexander M'Gregor and his family were passengers on board.

Upon the return of the monition in the District Court, Andrew Ogden interposed a claim, in behalf of himself and M'Gregor, to the ship and part of the cargo. He also claimed another part of the cargo as his sole property. He likewise interposed a claim in favor of Selah Strong and Son—of John Whitten—of the firm of Howard, Phelps & Co.—of Abraham and George Smedes—of Peter and Ebenezer Irving & Co.—of Henry Van Wart—of Irving and Smith—of Jabez Harrison—of Hugh R. Toler—and of Thomas C. Butler. This claim was an affidavit of Mr. Ogden, in which he swore that he had not a full knowledge of the concerns of all the persons for whom he claimed, but verily and fully believed that many of the said goods on board the St. Lawrence were sent in payment of debts due, previous to the war, to several of the persons for whom he claimed. This claim was filed on the 17th of August, 1813.

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William Penniman of Baltimore, also interposed a claim for five chests of merchandize, which he swore were purchased for him by John Barnet of London, prior to the war, with funds which he had in England eighteen months before the declaration of war, and in pursuance of orders given by him nine months previous to that event. He also swore that he had at Baltimore, the original invoice of the purchase of said goods, and other documentary evidence to prove the aforesaid fact.

There was also a claim of the master for two cases and five trusses of merchandize, and six bolts of russia duck.

In none of these claims was there a designation of the marks or numbers of the casks, bales, or cases which belonged to the different parties for whom the property was claimed.

The master, in answer to the 12th standing, interrogatory, said, that for the names of the respective laders, he referred to the bills of lading. That the goods were mostly, if not all, consigned "to order." That the goods were to be delivered to order, at such place as the owners or consignees should appoint; but that he did not know what interest any of the consignees or the shipper might have in the goods.

In answer to the 16th interrogatory, the captain stated that his letter bags, two in number, had been taken possession of, and sent to the custom house: and that, as to any letter he had, directed to the consignees or owners, he had done what he had a right to do; and that all his other papers had been forcibly taken away.

By Mr. M'Gregor's answer to the 9th interrogatory, it appeared that he was interested one half part in the ship; that his sole object in becoming interested in the ship was that of returning to the United States; that he also owned one half of the copperas and of the earthen ware on board, shipped by Ogden, Richards and Selden, and, as he believed, one half of the coal, but that, as to the last article, he was not positive, no invoices of said goods having been delivered to the deponent.

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In relation to the vessel, Mr. M'Gregor deposed, that the only document relative to the sale of the ship, he believed to be a letter to the former owners from their agent, requesting them to make a bill of sale transferring said ship to Andrew Ogden and James Heard, or either of them, which he gave to Andrew Ogden.

It appeared further, from the examination of Mr. M'Gregor, that he was born in Scotland, was naturalized in the United States in 1795, had lived, the last seven years, in Liverpool, and was returning in the St. Lawrence, with his family, to the United States.

The goods claimed by Ogden as his sole property were shipped by the house of Ogden, Richards and Selden. The two gentlemen last named resided at Liverpool.

The District Court condemned the St. Lawrence and all the cargo, except the parts claimed by M'Gregor and the master. Both parties appealed from this decree to the Circuit Court, where the ship and whole cargo were condemned. From this decree the Claimants appealed to the Supreme Court, where the cause was argued by IRVING and WEBSTER for the Claimants, and PITMAN for the captors.

IRVING, *for all the Claimants except M'Gregor and Penniman.*

It is contended, on the part of the Claimants generally,

1. That the ship St. Lawrence, being an American vessel, owned and navigated wholly by citizens of the United States, and being on her return to the United States, with a cargo owned wholly by American citizens, could not legally be subject to capture by American cruizers.

2. That the character of an American citizen, whether native or naturalized, is not rendered hostile by his residence in a hostile country, if, within a reasonable time after the declaration of war, he withdraws with his funds from the hostile country and returns to his own: and that he has a right so to withdraw.

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3. That a citizen of the United States, not resident in the enemy country, has also a right, after the declaration of war, to withdraw his funds, within a reasonable time, from that country.

4. That if the Courts below were not satisfied that the property claimed was, *bona fide*, property of American citizens, fairly purchased and shipped, the said Courts ought to have let the Claimants into further proof fully to establish that fact; and, as they refused so to do, that the Claimants are entitled, in this Court, to the same privilege.

The argument will be confined to this last point.

It will probably be urged, on the part of the captors, that the secreting of papers by the master is good ground for refusing us further proof. We contend, that as the master was only the agent of the Claimants to navigate the ship, his act is not sufficient to justify the Court in such refusal. On this point the Court is referred to the following authorities. 1 *Rob.* 100, 119, *The Concordia.*—*id.* 109, 129, *The Hoop, De Vries, master.*—*id.* 86, 102, *The Bernon.*—2 *Rob.* 296, 362, *The Polly.*—*Chitty's Law of Nations, App.* 303.—2 *Rob.* 87, 104, *The Rising Sun.* The last case goes also to show that a claim may be made by an agent: and that too, without clealy distinguishing the rights of each particular Claimant. See also, *Doug.* 614, *Le Caux v. Eden.*

WEBSTER, for *M'Gregor* and *Penniman*—several Claimants.

1. M'Gregor claims half the ship and part of the cargo.

We contend that a distinction is to be taken between an American citizen, domiciled in England at the breaking out of the war, withdrawing his funds, and an American citizen who goes to England after the declaration of war, for the same purpose. That the former, whether a native or naturalized citizen, has a right (and perhaps it is his duty) to return to the United States with his effects. If he has no such right, why should the law of nations have provided a reasonable time for removing in case of war? This rule of the law of na-

tions has been founded upon the necessity of the case, and upon the hardship which would attend the want of such a rule. A citizen of one country may lawfully go to any other country, in time of peace, and take up his residence there; and it would be very hard if he must suffer by the sudden and unexpected breaking out of a war—an event over which he had no control. A neutral would be permitted to withdraw his funds in such a case; and if we should allow the privilege to neutrals, why should we deny it to our own citizens? 1 *Rob.* 1, *The Vigilantia.* 1 *Bos. and Pul.* 355, *Bell v. Gilson.*

The case of *Escott*, cited in *the Hoop*, 1 *Rob.* 165, 196, may perhaps be thought to make against our claim. But the cases are not alike. In that case, Escott *sent* for his property: here, M'Gregor came with his.

A character gained by residence, is lost by non-residence. When M'Gregor ceased to reside in England, his character, if hostile before, no longer continued hostile. That it was not his intention to continue his residence in England, is clearly evidenced by his actual return to the United States with his family.

With regard to his half of the ship, we contend that if he had a right to return, he had a right to use the means necessary for that purpose—he had a right to purchase a ship for the conveyance of himself and his family. So if it was lawful for him to withdraw his funds, he might lawfully invest those funds in merchandize, if he could not otherwise withdraw them. 4 *Rob.* 161, 195, *The Madonna delle Gracie.* 3 *Rob.* 17, 12, *The Indian Chief.* 5 *Rob.* 248, *The President.* 5 *Rob.* 84, 90, *The Ocean.* 5 *Rob.* 60, *The Diana.*

2. As to Penniman's claim, we shall, at present, merely ask the Court to allow us further proof.

PITMAN, *contra*, contended,

1. That there was no legal evidence that the cargo belonged to the Claimants, as claimed.

2. That from the origin and character of the voyage, and suppression of papers, concealed enemy interests were to be presumed; that, therefore, all right to fur-

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ther proof was forfeited, and that condemnation of the whole, as enemy's property, must ensue.

3. That the ship, at the time of capture, belonged to Dickey and Thompson, and was liable to condemnation on the ground of having gone to Liverpool in April, 1813, with a cargo of iron and deals, as well as from the circumstances of the voyage upon which she was captured.

4. That the ship and cargo, whether belonging to citizens or enemies, being taken in trade with the enemy, were clothed with a hostile character, and therefore liable to condemnation.

Some other points were also touched upon in the course of the argument, viz.

The want of proper Claimants, of definite claims, and the requisite affidavits to support them.

The connexion of Ogden with a house of trade in the enemy country: the presumption that the partnership was, in fact, interested in what he claimed as his sole property; and that he must be considered as a British merchant, in regard to those transactions originating with his house in Liverpool.

The national character of M'Gregor, which presents itself in the case of the *Venus*.

The presumption that Van Wart resides in England, the claim being by Ogden for Irving and Smith, of New York, *his consignees*; and

The effect of the license.

Tuesday, March 15th.

The case was submitted without further argument: and on

Wednesday, March 16th. Absent....MARSHALL, *Ch. J.*

LIVINGSTON, *J.* after stating the facts of the case, delivered the opinion of the Court as follows:

From the manner in which the Appellants have argued this cause, it does not appear that they are very sanguine in their expectations of our reversing the decree of the Circuit Court, on the evidence on which that Court and the District Court proceeded; but that their chief hope is derived from the further proof which they have it in their power to produce, provided an opportunity be afforded them for that purpose. Except as to the property claimed by Mr. Penniman and Mr. M'Gregor, this Court does not perceive how the Circuit Court could have done otherwise, upon the proof before it, than confiscate the cargo of the St. Lawrence, as prize of war. Without meaning to decide, at present, on the right of an American citizen having funds in England, to withdraw them after a declaration of war, or of the latitude which he may be allowed in the exercise of such a right, if it exists, we think the evidence would have justified the Court in considering this property as belonging to enemies of the United States.

The St. Lawrence had gone to England after the war was known, and had sailed from a British port, nearly one year after war had been declared: she was loaded in the country of the enemy, and by persons carrying on trade there: she was furnished with a British license, which extended both to British and American property: and the bills of lading, not being in a very common form, were well calculated to excite suspicion. But these circumstances, strong as they are, might, if every thing had been fair, have been so explained as to have convinced the Court that the property was truly American. Was this done, or even attempted? If we look at the conduct of the master and the Claimants, we find them both acting in a way which left the Court no other safe conclusion but that the cargo of the St. Lawrence was enemy property. The captain, instead of delivering it to the captors, or bringing into Court the letters to the consignees, which, no doubt, covered invoices and bills of lading, lets us know, in a way not to be misunderstood, that he had delivered or sent them to the parties to whom they were addressed. Taking his examination with the usual course of business, which is to accompany every shipment with a letter, no doubt can remain that such letters were not only on board, but that they have been regularly received by the re-

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spective consignees; for it is not pretended by the master that they were taken from him by the captors. Here, then, is not only a subduction of very important papers by the master, but an acquiescence in such conduct, on the part of the consignees, and a continued suppression of the same papers, to this day. The only proof, then, which the Court had of the interest of the Claimants, except of Mr. Penniman's, the master's, and Mr. M'Gregor's, is in the claim of Mr. Ogden, who states that he is not acquainted with their concerns, but believes they had an interest in the cargo; without, however, attempting to designate the packages belonging to either of them. The Court below, therefore, might fairly consider the Claimants as having not only failed in making out a legal title to the property, but as concealing papers which would have shown a title elsewhere.

But if there was a defect of proof below, it is thought the Claimants are entitled to time for further proof; and that, if this be allowed, they will be able to show that the property in question was purchased with American funds which were in England previous to the war, and that the Claimants were the true and *bona fide* owners thereof. It is certainly not a matter of course, in this Court, to make an order for further proof. When the parties are fully apprized of the nature of the proof which their case requires, and have it in their power to produce it, an appellate Court should not readily listen to such an application: but when it appears that the parties who ask this indulgence have most pertinaciously withheld from the Court letters and other documentary testimony, which must be supposed, in this particular case, to have been in their possession, they come with a very ill grace to ask for any further time to make out their title. But if we examine the affidavits which have been made to obtain further time, we shall find them all silent as to the papers which they must have received by the St. Lawrence; for in not one of them is a letter of that kind or an invoice mentioned; nor do they deny that such letters or invoices were received by them. Under such circumstances, this Court thinks that it cannot, consistent with the circumspection with which such applications ought always to be received, allow the Appellants time for further proof. The master's adventure, it is said, has been given up.

Of Mr. Penniman's claim the Court thinks more favorably. In the claim which he filed personally, he not only swears that the property belongs to him, but states very particularly how and when it was purchased. He states, further, that the original invoice and other documentary evidence were at Baltimore; and in the affidavit made by Mr. Campbell, during the present term, there is such a full and distinct history given of this whole transaction, founded upon original letters and bills of exchange, that it is impossible to harbor one moment's doubt that the five chests of merchandize claimed by Mr. Penniman, did, at the time of shipment, and long before, belong to him. To this affidavit is also annexed the original letter and invoice which he received by the St. Lawrence, which must dissipate every doubt on the question, if any had previously existed. Where so strong a case is made out, the Court is willing to impute to accident or mistake the non-production of these papers below. Perhaps Mr. Penniman thought he did sufficient in stating they were in his possession. Certain it is, he could have no motive for suppressing papers which would have established so conclusively his title to the merchandize which he claimed. The Court, therefore, allows him until next term, to make proof, by affidavit and the production of documents, of his right to the property claimed, at the time of its shipment at Liverpool: and the same indulgence is allowed to the captors.

In regard to the claim of M'Gregor to a part of the cargo, there is also some difference between his case and that of many others of the Claimants. He swears positively to his interest, but that no invoice was delivered to him by the shippers, Ogden, Richards and Seldon. Ogden, also, swears to the interest of Mr. M'Gregor. Perhaps this testimony is sufficient to satisfy a Court, as it did satisfy the District Court, that the property really belonged to Mr. M'Gregor. But if that be the case, other questions will arise of too much importance to be decided on the last day of the term, and when the Court is not full. Whether an American citizen has a right to withdraw his funds from the country of a belligerent, after a war; or if he have, whether he have a right to charter a vessel for that purpose; and, if he may go thus far, whether he may bring British

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goods, on freight, to this country, without affecting thereby the safety of his own goods; are questions which the Court does not now decide, and will therefore suspend, at present, giving any final opinion on the claim of Mr. M'Gregor to a part of the cargo; who, in the mean time, is also at liberty to make further proof on the same points with Mr. Penniman;—the captors having the same right.

It may be well doubted whether Mr. Ogden and Mr. M'Gregor have any title to the St. Lawrence: but whether she belong to them or to Messrs. Dickey and Thompson, her fate seems necessarily involved in the decision of the *Rapid*, which was made this term. She went to England since the war, and is taken bringing a cargo from that country. If the whole of the cargo had belonged to Mr. M'Gregor, or any other American returning with his property to the United States, the Court means not to say whether it would or would not have been cause of forfeiture: but when we find but a small portion of the cargo in that predicament, there can be no escape for her. The St. Lawrence was certainly guilty of trading with the enemy; and, being taken on her way from one of his ports to the United States, she is liable, on that ground, to be confiscated as prize of war, to whomever she might belong at the time.

Upon the whole, the sentence of the Circuit Court is affirmed in all its parts, with costs; except so far as it condemned those portions of the cargo which were claimed by Mr. Penniman and Mr. M'Gregor, respecting which this Court will advise until the next term.

THE HIRAM, BARKER, MASTER.

Sailing on a voyage under the license and passport of protection of

THIS was a case of capture, as prize, by the private armed brig Thorn, duly commissioned by the president of the United States, and commanded by Asa Hooper, Esq.

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The Hiram, owned by Samuel G. Griffith, an American citizen, sailed from Baltimore on or about the 24th of September, 1812, with a cargo of flour and bread, on a voyage to Lisbon. She was captured on the 15th of October following, and sent into Marblehead, in the district of Massachusetts, for adjudication. She was libelled in the district Court for the said district, by the captors. The vessel was claimed by Barker, the master, in behalf of Samuel G. Griffith; and the cargo by the supercargo, in behalf of said Griffith and various other shippers, American merchants at Baltimore.

the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to condemnation as prize of war.

Sailing with a cargo of provisions to the port of a neutral, who is the ally of our enemy in his war with another power, is such a furtherance of the views of our enemy.

Among the papers found on board the Hiram, at the time of her capture, were certain papers commonly called a British license or protection, being a certified copy of a letter from admiral Sawyer to Andrew Allen, esq. late British consul at Boston, and an additional letter of safe conduct from Mr. Allen. It appeared from the evidence, that this license was purchased from a citizen of the United States, and that a part of it was not filled up at the time of the purchase; and that such licenses were a common article of sale in Baltimore and other places.

There was also found on board, the owner's letter of instructions, in which the supercargo was directed to remit the proceeds of the cargo in bills of exchange or government bills to the shipper's correspondents in Liverpool; and moreover to sell the vessel at Lisbon, if an advantageous sale could be made, and remit the proceeds to England.

It appeared from the evidence in the cause, that such remittances in bills of exchange were common among merchants.

The captors claimed condemnation of the vessel and cargo,

1. Because of the British protection or license.

2. Because the remittances were directed to be made in England in bills of exchange.

The district and Circuit Courts both decided that

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neither the vessel nor cargo were liable to condemnation; but allowed the captors their expenses. From the decree of the Circuit Court both parties appealed.

SWANN, *for Claimants.*

The opinions delivered in the cases of the *Aurora* and the *Julia* may, perhaps, upon first view, be considered as deciding the present case: but upon a closer examination, it will be found that the facts in this case differ materially from those which appeared in the two former.

In the first place, in the case of the *Aurora*, there was an intent to supply the enemy—there was an intent to trade with the enemy: there was a direct violation of the act of congress of 6th July, 1812: but here, there was no such violation. The license, in this case, was merely to trade with the neutral ports of Spain and Portugal. The present case differs from that of the *Julia*, inasmuch as the claim here is for the *cargo* only, and the license is for the *vessel*; whereas there, the license extended as well to the cargo as the vessel.

But these papers do not, in fact, import a license: they only intimate an intended forbearance, on the part of Great Britain, to molest a lawful trade to Spain and Portugal. Here was no sailing under the protection of Great Britain.

Again, this license, as it is called, was purchased as an article of commerce, from a private individual; not from admiral Sawyer nor from Mr. Allen: it is only a copy of admiral Sawyer's letter certified by Allen. The obtaining such a copy of the letter was not unlawful.

Besides, there is no evidence that admiral Sawyer ever gave the directions, mentioned in his letter, to the commanders of the squadron under his command, not to molest American vessels laden and bound as therein described. Indeed, his power to give such instructions does not appear: and if further proof be allowed, we can prove that licenses of this description were, in fact, disregarded in other cases.

DEXTER, *contra.*

In answer to the argument, that the license in this case related to the vessel only, while the claim is for the cargo alone, it may be observed, that the owners of the cargo were the owners of the license, which ought therefore to be considered as extending to the cargo as well as to the vessel. The license was undoubtedly intended as a protection. The voyage was clearly undertaken in furtherance of the views of the British government, as expressed in admiral Sawyer's letter annexed to the pass: and I understand the ground of the decision in the case of the *Aurora* to be, that she sailed under the protection, and in furtherance of the views, of the enemy.

But if the Court should not consider the sailing under the license sufficient cause of condemnation, we contend that this was also a case of indirect trade with the enemy; inasmuch as the proceeds of the cargo were directed by the owner to be remitted from Lisbon to Liverpool in bills of exchange.

SWANN, *in reply.*

Buying a bill of exchange on England is not trading with the enemy. A man may, in an enemy country, purchase a ship from a neutral. 4 *Rob.* 282, 283, *the Countess of Lauderdale.* Sailing under an enemy's pass, without trading with the enemy, is no cause of condemnation.

There was not, in this case, such a subserviency to the views of the enemy, as ought to subject the property in question to the sentence prayed for by the captors. It is certainly lawful for the enemy to relax the rights of war: he may lawfully declare that he will suffer certain vessels to pass: and we conceive that if those vessels sail under the faith of such a declaration, it is no cause of condemnatian. The enemy might have declared that he would not capture any vessel navigated wholly by Boston seamen; but surely our government would not condemn a vessel for sailing under the faith of such a declaration.

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*Wednesday, March 16th. Absent....*MARSHALL, *Ch. J.*

WASHINGTON, *J.* delivered the opinion of the Court.

This vessel was the property of Samuel G. Griffith, an American citizen. On or about the 24th of September, 1812, she sailed, with a cargo of flour and bread, from Baltimore to Lisbon; and on her voyage thither, was captured, on the 15th of October following, by the privateer brig Thorn, and brought into the district of Massachusetts, where she and her cargo were libelled as being enemies' property.

The brig was claimed by the master, in behalf of Griffith, and the cargo by the supercargo, as belonging to the said Griffith, and other shippers, being American merchants of Baltimore. Among the papers found on board of this vessel at the time of the capture, was a letter from admiral Sawyer, dated the 5th of August, 1812, addressed to Andrew Allen, junr. as British consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, which states, that, being aware of the importance of ensuring a constant supply of flour and other dry provisions to Spain and Portugal, and to the West Indies, he should give directions to the commanders of his majesty's squadron under his command, not to molest American vessels unarmed and so laden, *bona fide* bound to Portuguese and Spanish ports, whose papers should be accompanied with a certified copy of that letter under the consular seal of the said Allen; also a letter from the said Allen, dated 15th September, 1812, addressed to all the officers of his majesty's ships of war, or privateers belonging to subjects of his majesty, reciting that it is of vital importance to continue a full and regular supply of flour and other dry provisions to the ports of Spain and Portugal, or their colonies, and that, in consequence thereof, it has been thought expedient by his majesty's government that every degree of protection and encouragement should be given to American vessels so laden, and bound to the ports of Spain and Portugal or their colonies, and that, in furtherance of these views of his majesty's government, admiral Sawyer had directed to him a letter dated the 5th of August, 1812, (a copy of which is annexed,) with instructions to furnish American vessels so laden and des-

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tined, with a copy of his letter certified under his, the said Allen's, consular seal, which documents are intended to serve as a perfect safe-guard and protection to such vessel in the prosecution of her voyage; and that, in compliance with such instructions, he has granted to the American brig *Hiram*, whereof *John B. Barker* is master, now lying in the port of Baltimore, and laden with flour and bread, bound *bona fide* to Lisbon, a copy of the said admiral Sawyer's letter certified under his consular seal, requesting all officers of his majesty's ships of war, or of private armed vessels belonging to subjects of his majesty, not to offer any molestation to the said vessel, but, on the contrary, to grant her all proper assistance and protection on her passage to Lisbon, and on her return from thence to her port of departure, laden with salt or in ballast only.

Under an order calling upon the different Claimants to give further proof relative to the British license found on board the brig, when and where it was obtained, of whom, and by whom, and on what terms, and, generally, relative to all facts and circumstances concerning the procurement of the same, William Hartshorn made an affidavit stating that he purchased for Mr. Griffith, the owner of the vessel, in September, 1812, from John R. Waddy, of Virginia, but then in Baltimore, a citizen of the United States, a license to protect a vessel laden with provisions and bound to Lisbon, from capture by British cruizers, for which he was to pay one dollar per barrel for what the vessel would carry, payable $500 in cash, and the balance on the safe arrival of the vessel at Lisbon: that the said license was in blank, for inserting the names of any vessel and master: and that the blanks in the said license were filled up in his presence. This witness, as well as others, states that these licenses form an article of traffic in market, as much so as flour.

The vessel and cargo were acquitted in the District Court, and a *pro forma* decree of affirmance made in the Circuit Court; from which decree an appeal to this Court was taken.

In the case of the *Julia*, decided at this Court, it was laid down in general terms, "that the sailing on a voyage under the license and passport of protection of the

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enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war;" and, as explanatory of the general reasons for that opinion, a reference was made to the opinion of the learned judge who decided that case in the Circuit Court.

It is contended by the counsel for the Claimants, that the facts in this case differ so materially from those which appear in the case of the *Julia*, that the principles of law which ruled that case are inapplicable to this, and, consequently, ought not to govern the decision of the Court upon it.

There certainly are some differences in the two cases; and these were considered sufficiently strong by the district judge who acquitted this vessel and cargo, to condemn the *Julia* and her cargo.

The important circumstance which appears to have influenced the decision of the district judge in that case, was, that the license contemplated the means of ensuring a *constant supply* of dry provisions *to the allied armies* in Spain and Portugal, and, consequently, an unlawful connexion with the enemy to supply his armies, and a subserviency to the interests of that enemy. In this case, no such views are expressed in the license of admiral Sawyer; yet the Court must be wilfully blind not to see that this was, in reality, the object of admiral Sawyer and of Mr. Allen, and that it must have been so understood by those who sailed under this license.

In both cases, the allied armies were to be supplied, not by sales made directly to their agents, (for this is not required by either,) but by carrying supplies to the Peninsula, which would indirectly come to their use. The license, as well as the letter of Allen accompanying it, points out the great importance of such supplies being sent to Spain and Portugal; and the latter adds, that, in furtherance *of these views of his majesty's government*, he had been directed by admiral Sawyer to furnish a copy of his letter to vessels so laden and destined. Can it be said that an American citizen, sailing under the protection of papers professing such to be the views of the British government, does not act in such a manner as to sub-

serve the views and interests of the enemy? Upon the whole, the Court is of opinion that there is no substantial difference between this case and that of the *Julia*; and that this is fully within the principle laid down by this Court in deciding that case, and the reasoning to which it refers.

It was stated, on the behalf of the Claimants of the cargo, that they ought not to be affected by the illegal act of the owner of the vessel in sailing under the protection of this license. It is a sufficient answer to this argument to observe, that, in this case, the Court must presume that the license was known to the owners of the cargo, if it was not the joint property of all. It is inconceivable that the owner of the vessel should expend about $1600 for the protection of a cargo in which it appears he was not largely concerned, without communicating such an advantage to his shippers, and even requiring some reimbursement, either by demanding higher freight, or compensation in some other way. But what is conclusive on this point, is, that an order for further proof in relation to this license was made, and yet no affidavit or proof is offered by any of the owners, denying a knowledge of these documents being on board.

The decree must be reversed, and the vessel and cargo condemned to the captors as prize of war.

THE JOSEPH, SARGEANT, MASTER.

Case of hostile trade. Not excused by the necessity of obtaining funds to pay the expences of the ship; nor by the opinion of an American minister, expressed to the master, that by undertaking the voyage

THIS was the case of a vessel, *the Joseph*, owned by American citizens, captured by the privateer *Fame* on the 16th of July, 1813. The *Joseph* sailed from Boston with a cargo on freight, on or about the 6th of April, 1812, on a voyage to Liverpool and the north of Europe, and thence directly or indirectly to the United States. She arrived in Liverpool, and there discharged her cargo; and, on the 30th of June following, with another cargo, of mahogany, taken in at Hull, sailed for St. Petersburg under the protection of a British license, granted on the 8th of June, 1812, authorizing

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the export of mahogany to St. Petersburg, and the importation of a return cargo to England. The brig arrived at St. Petersburg, and there received news of the war between the United States and Great Britain. About the 20th of October, 1812, she sailed from St. Petersburg for London, with a cargo of hemp and iron on freight, consigned to merchants in London; and, having wintered in Sweden, in the spring of 1813 she sailed, under convoy instructions from the British ship *Ranger*, for London, where she arrived and delivered her cargo. About the 29th of May she sailed for the United States, in ballast, under a British license; and was captured, on the 16th of July, at no great distance from Boston light-house. She was sent into the port of Salem for adjudication, as prize.

In the District Court of Massachusetts the claim of the owners, Messrs. Dall and Vose, was rejected, and the property condemned to the United States. From this decree the captors and Claimants appealed.

In the Circuit Court the property was condemned to the captors. From this decree the Claimants and the United States appealed.

It was contended, on the part of the Claimants,

1. That it was lawful, in June, 1812, (before the war) to take the license to go from England to the north of Europe, and to bring back a cargo to England.

2. That the taking a freight from the north of Europe to England was from necessity, to obtain funds to pay the debts of the ship, the master not having been able to sell the cargo at St. Petersburg for any price.

3. That the opinion of the minister of the United States at St. Petersburg, who told the captain of the Joseph that there was no law against his returning to England under the protection of his license, and who also sent dispatches by the Joseph to the government of the United States, though he knew of the intention to return to England and thence to the United States, was, in effect, a license, especially as to the claim of the United States.

he would violate no law of the U. States. If an American vessel be captured on a circuitous voyage to the U. States, in a former part of which voyage she has been guilty of conduct subjecting her to confiscation, though at the time of capture she is committing no illegal act, she must be condemned

Where the termini of a voyage are already fixed, the continuity of such voyage cannot be broken by a voluntary deviation of the master, for the purpose of carrying on an intermediate trade

A capture as prize of war may lawfully be made within the territorial limits of the U. States, at any place below low-water mark.

4. That there was no trade with the enemy, but with neutrals only; the freight having been taken on neutral account, in a neutral territory, and delivered to a neutral house in Great Britain.

5. That if any offence was committed, it was completed upon the delivery of the freight in Great Britain; and that therefore the vessel was not liable to capture or seizure, on that account, in a subsequent voyage from Great Britain to the United States.

6. That if she was liable to seizure for having adopted the character of an enemy vessel by any act contrary to the allegiance of the owners, yet she was not to be condemned as prize to the captors, as she was *voluntarily returning* to the United States and her port of discharge, and had actually arrived within the district of Massachusetts. That the capture, therefore, was not the occasion of her being brought in; so that if she was liable at all, even as enemies' property, the condemnation must be to the United States as a *droit of admiralty*. But,

7. That the vessel was not liable to be condemned to the United States, because the declaration of war was, in effect, an invitation, if not a command, to the citizens of the United States, abroad at the time, to return home, and the law allowed a reasonable time and way to effect that return.

PITMAN, *for the captors*, contended,

1. That the facts appearing in the case proved a trading with the enemy, which subjected the vessel to confiscation as prize.

2. That the vessel was not captured within the territorial jurisdiction of the United States: that this appeared from the preparatory examinations of the master and the mate, the first of whom stated "that he was captured in sight of Half-way-rock, off Salem harbor," which was a marine league from the shore; and the latter, "that the vessel was captured about two leagues east from Boston light-house."

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3. That, though the fact be admitted as contended for by the Claimants, yet the captors were authorized by their commission to capture within the territorial jurisdiction of the United States on the high seas, which were stated in their instructions as extending to low-water mark.

*Wednesday, March 16th. Absent....*MARSHALL, *C. J.*

WASHINGTON, *J.* after stating the facts of the case, delivered the following opinion of the Court:

After the decision of this Court in the cases of the *Rapid* and of the ship *Alexander*, it is not to be contended that the sailing with a cargo, on freight, from St. Petersburg to London, after a full knowledge of the war, did not amount to such a trading with the enemy as to have subjected both the vessel and cargo to condemnation as prize of war, had she been captured whilst proceeding on that voyage. The alleged necessity of undertaking that voyage to enable the master out of the freight to discharge his expenses at St. Petersburg, countenanced, as the master declares, by the opinion of our minister at St. Petersburg, that by undertaking such a voyage he would violate no law of the United States, although these considerations, if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this Court to admit as the basis of its decision. See the *Hoop*, 1 *Rob. Potts and Bell*, 8 *T. Rep.*

The counsel for the Claimants seemed to be aware of the insufficiency of this ground, and applied their strength to show that the vessel was not taken *in delicto*, having finished the offensive voyage in which she was engaged, at London, and being captured on her return home and in ballast. It is not denied that if she be taken during the same voyage in which the offence was committed, though after it was committed, she is considered as being still *in delicto*, and subject to confiscation; but it is contended that her voyage ended at London; and that she was, on her return, embarked on a new voyage. This position is directly contrary to the facts in the case. The voyage was an entire one from the United States to England, thence to the north of

Europe, and thence directly or indirectly to the United States. Even admit that the outward and homeward voyages could be separated, so as to render them two distinct voyages, which is not conceded, still it cannot be denied that the *termini* of the homeward voyage were St. Petersburg and the United States. The continuity of such a voyage cannot be broken by voluntary deviation of the master for the purpose of carrying on an intermediate trade. That the going from St. Petersburg to London was not undertaken as a new voyage, is admitted by the Claimants, who allege that it was undertaken as subsidiary to their voyage to the United States. It was, in short, a voyage from St. Petersburg to the United States by the way of London; and, consequently, the vessel, during any part of that voyage, if seized for conduct subjecting her to confiscation as prize of war, was seized *in delicto*.

Another objection relied upon by the Claimants, is, that this vessel was captured within the territorial limits of the United States. The fact upon which this objection is raised is not clearly established one way or the other. But admit it to be as contended for by the Claimants, the law is nevertheless against them. The commission granted to privateers authorizes them to seize and take any British vessels found within the jurisdictional limits of the United States, or elsewhere on the high seas, and to bring them in for adjudication; and also to detain, seize and take all vessels and effects, to whomsoever belonging, which shall be liable thereto according to the law of nations and the rights of the United States, as prize of war. The first instructions given by the president to the private armed vessels of the United States, define the high seas, referred to in the commission, to extend to low-water mark, with the exception of the space of one league, or three miles, from the shore of countries at peace with Great Britain or the United States. The general expressions of the commission, explained by these instructions, and containing no exception but in relation to friendly powers, prove incontestibly that all captures as prize of war may lawfully be made within the territorial limits of the United States, at any place below low-water mark.

The Court is also of opinion that there is no weight

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in another objection made by the Claimants, that this vessel was on her way and near to an American port at the time she was captured. The right of the captor to the property which he may seize as prize of war is derived under his commission, which is general and unqualified as to place and circumstances, and not from any peculiar merit which he may claim in any particular case. It is not for him to know whether a vessel which has offended against the law of nations, and is apparently destined to a port of the United States, will certainly enter the port: and certainly he is bound by no law to forego the opportunity which chance or his own vigilance may have presented to him to acquire property which, under his commission, he is authorized to appropriate to himself.

Decree affirmed.

THE GROTIUS, SHEAFE, MASTER.

Question as to the validity of capture; one man only having been put on board; the ship's papers and the navigation of the vessel being left to the master. Further proof ordered.

APPEAL from the sentence of the Circuit Court for the district of Massachusetts.

The *Grotius*, an American ship owned by Thomas Sheafe and Charles Coffin, the Claimants, sailed from Portsmouth, New Hampshire, March 2d, 1812, on a voyage, according to the shipping paper, from Portsmouth to one or more southern ports, and from thence to one or more ports in Europe, and back to her port of discharge in the United States, and to Portsmouth, if required. She arrived at New York, and sailed from thence with a cargo for St. Petersburg, and arrived at Cronstadt on the 17th of June, 1812. The cargo was owned by American merchants, and was consigned to a house at St. Petersburg. The consignees furnished a return cargo on the credit of the outward cargo. After the return cargo was put on board, the French armies having entered Russia and threatening to approach St. Petersburg, the consignees were apprehensive that their security for the return cargo might be lost. They arrested the ship and cargo, and would not permit her to

depart, but on condition that she should proceed to London with the cargo then on board, and that the captain should sign bills of lading to deliver the property in London to the order of the consignees; they stipulating that if they should have obtained payment from the proceeds of the outward cargo, the bills of lading should be given up to their owners or agents in London, and the cargo then to be at the disposition of the captain.

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The news of the war between the United States and Great Britain having reached St. Petersburg, the American ships in that port, (fifty or sixty in number,) with the knowledge and approbation of Mr. Adams, the American minister at the Court of St. Petersburg, sailed for England with British licenses. This was resorted to as the only course in which it was possible to get home. The Grotius sailed, among others, with such license. Owing to the lateness of the season, she put into Carlscrona, Sweden, where she lay from the 28th of November, 1812, until the 25th of March, 1813. On the 2d day of May following, she arrived at London, and there discharged her cargo consisting of iron, hemp and cordage, and, on the 17th of June following, departed for the United States, in ballast. On the 29th of July, she was captured by the privateer *Frolic*, John O'Diorne commander, who put one man on board of her from the privateer. The captain of the Grotius kept his papers and the command of his ship, and navigated her to Boston. On her arrival, she was libelled in the district Court of Massachusetts.

In this Court a question was made by the Claimants, as to the fact of capture.

The master, in answer to the 2d interrogatory, swore that he never considered the ship Grotius to have been taken or seized as prize:—that he was present when an armed schooner under English colors met with her, the commander of which represented her to be a British privateer called the *Bream*, and requested him to take on board a man and treat him as a gentleman until he arrived in the United States, to which he consented.

Gilman, the mate, in answer to the 2d and 3d interrogatories, stated, that, until his arrival, he never knew

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that the Grotius had been taken as prize;—that the master had been ordered on board the schooner, and returned with *Very*, the man who had been taken on board the Grotius.

Chambers, a seaman, in answer to the 3d interrogatory, stated that the Grotius was met by an armed schooner under English colors which obliged the mate of the ship to go on board her, and afterwards sent him back with a man who, on the next day, declared himself to be put on board as prize-master, saying that if they should fall in with a French vessel, he should be obliged to shew his commission.

The affidavit of *Very*, the alleged prize-master, confirms the statement of the mate, that the captain was ordered on board the privateer, and that he, *Very*, was directed by his commander, in presence of the captain of the Grotius, to go on board as prize-master; but that the master of the ship was to keep possession of the papers, and to navigate her into port.

In the district Court the ship was condemned to the United States. From this decree the captors and Claimants appealed.

In the Circuit Court the decree of the district Court was affirmed, *pro forma*, by consent of parties.

WEBSTER, *for the Claimants, contended,*

1. That, in this case, the ship was not captured, only one man having been put on board. That this case was not affected by the decision in the case of the *Alexander*. That a capture, as well as the bringing the vessel into port after the capture, must be the effect of power either actual or constructive. That the master of the ship did not know of the intention to capture, nor had he any idea that his vessel was captured, till long after the alleged prize master was put on board. That there was no agreement to consider it as a capture. And, lastly, that there was no *bringing* in.

2. That the proceeding to London, under the circumstances of this case, was not such a trading with the

enemy as induced a forfeiture of the ship. That it was an act justified by the necessity of the case, there being no other way to get the ship home. That the master was further justified in acting as he did, by the advice of Mr. Adams, the minister at St. Petersburg, where the ship was when the war was first known there. 1 *Rob.* 184, 220, *the Betty Cathcart.*

3. That the ship was not taken *in delicto*—that there was no trade with the enemy—that the master merely delivered the cargo in London—that the voyage was not to be considered as a continued voyage from the United States to Russia, from Russia to England, and from England to the United States, but merely as a voyage from Russia to London.

4. That the privateers of the United States had no authority, either under the prize act or their commissions, to capture American vessels found in circumstances like those of the Grotius; that is to say, bound directly to the United States, and within two or three days sail of her destined port. That if she was to be condemned at all, it must be as a *droit of admiralty*, not as prize to the captors. That privateers claim under a grant from the United States, and must be limited by the express terms of such grant, which ought to have a fair construction, and cannot be supposed to extend to cases where there is no risk, no trouble, no labor on the part of the captors. That the grant is to be considered as a reward for their services. That if a vessel is in port, either voluntarily or by stress of weather, she is no subject of capture.

PITMAN, *contra, for the captors,*

Contended, that the Grotius was liable to condemnation for having sailed from Russia to England with a British license, after knowledge of the war between Great Britain and the United States, and with contraband of war on board;—that the voyage was to be considered as one continued voyage from Russia to the United States;—that the vessel, therefore, if taken at any time before her arrival in the United States and in a place of safety, must be considered as captured *in delicto.* That the case was analogous to that of a vessel captured

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while coming out of a blockaded port into which she had previously slipped by stealth. 1 *Rob.* 126, 150, *the Vrow Judith.*—*id.* 72, 86, *the Frederick Molke.* That physical force was not necessary to constitute capture; that it had been so decided in the case of the *Alexander;* and that, if any doubt existed in the mind of the Court with regard to the capture, it was a case for further proof. That the privateers of the United States were authorized to capture even within the jurisdiction of the United States.

DEXTER, *in reply,*

Urged that although the master of the Grotius had heard of the war, he had also heard of the repeal of the orders in council, and that an armistice was about to be agreed upon, if it had not already taken place; that, therefore, it was as if they had not heard of the war at all. That, in order to subject a vessel to condemnation, she must be captured in the prosecution of the voyage in which she was guilty of the offence: that the Grotius was not captured on that voyage; that the voyage from Russia to England was to be considered as a distinct voyage, after the completion of which the vessel was not liable to condemnation for any offence committed on that voyage. That even if the proceeds of the cargo previously deposited in England had been on board at the time of the capture, it would have been no cause of condemnation. That when the cargo was deposited, the offence was deposited with it. *Park.* 239, *Amer. Ed.* 1 *Rob.* 193. 230, *the Rebeckah, note.* 2 *Br. Civ. Law,* 58.—*id.* 250.—*id.* 262.

Wednesday, March 16th. Absent....MARSHALL, *Ch. J.*

WASHINGTON, *J.* delivered the opinion of the Court in this case, as follows:

This case differs in no material respect from that of the *Joseph,* just decided, except that in this a question arises as to the validity of the capture. The master of the *Grotius,* in answer to the second standing interrogatory, swears that he hath never considered the ship to have been taken or seized as prize. That he was present when an armed schooner under English colors met with her, the commander of which represented her

to be a British privateer called the *Bream*, and requested him to take on board a man, and treat him as a gentleman until he arrived in the United States; to which he consented. This testimony of the captain is confirmed by Gilman, the mate, in answer to the 2d and 3d interrogatories, who adds, that *Very*, the man who was put on board, never conducted as prize master, nor in any other manner than a passenger would, during the voyage. *Pierce*, one of the seamen, who accompanied the captain on board the schooner, swears that he never knew the ship was seized as prize until after her arrival within the Boston light-house. *Chambers*, another seaman belonging to the Grotius, in answer to the third interrogatory, says that she was met by an armed schooner under English colors which obliged the mate of the ship to go on board her, and afterwards sent him back with a man who, on the next day, declared himself to be put on board as prize-master, saying that if she should fall in with a French vessel, he should be obliged to show his commission. That he knows not upon what pretence or for what reason she was taken, not knowing, in fact, that she was made prize of, until her arrival at Boston.

Daniel J. Very, the alleged prize master, has deposed, on oath, that he was present at the capture of the Grotius by the Frolic; that the captain of the ship was ordered on board the schooner with his papers; and that he, *Very*, was directed by his commander to go on board as prize master, and this in the presence of the captain of the Grotius; that the master of the ship was to keep possession of the papers, and to navigate her into port. That he accordingly went on board as prize master, carrying with him a copy of the commission of the Frolic; and instructions, in writing, from the commander to him (*Very*) as prize-master. That the captain of the Grotius informed his crew that in case a British cruizer should board the Grotius, and they should be asked respecting the said *Very*, they were to answer that he was a passenger.

Without giving any opinion as to the regularity of admitting the affidavit of the prize master as a part of the preparatory evidence, the Court is of opinion that the facts necessary for deciding upon the validity of the

THE GROTIUS, SHEAFE, MASTER.

capture, are not sufficiently clear; and that it will be proper to make an order for further proof, to be furnished by the captors and the Claimants, with respect to all the circumstances of the capture.

This point appears not to have been made or considered in the Court below.

1814. ALEXANDER AND OTHERS *v.* PENDLETON.

If the case be clear, a Court of Equity will interpose to quiet the title. A purchaser with notice is protected by his vendor's want of notice. An adversary possession of 50 years, though with knowledge of a better title, constitutes a good defence against that title. A purchaser without notice has a right to join his adversary possession to the ostensible adversary possession of his vendor, so as to give himself the benefit of the statute of limitations.

THIS was an appeal from the Circuit Court for the district of Columbia, sitting at Alexandria, as a Court of Equity.

The case, as stated by MARSHALL, *Ch. J.* in delivering the opinion of the Court, was as follows:

This suit was brought in the year 1806, in the Circuit Court for the county of Alexandria, for the purpose of quieting the title of Nathaniel Pendleton, the Plaintiff in that Court, to 83 acres of land contiguous to the town of Alexandria which have been in his possession, and in the possession of those under whom he claims, from the year 1732 to the present time.

Robert Alexander, being seized of a large tract, on part of which the town of Alexandria now stands, on the 17th of January in the year 1731—2, executed to Dade Massey, then about to intermarry with his daughter Parthenia Alexander, his bond in the penalty of 800*l.* with a condition that he would convey to his daughter Parthenia and her heirs, on demand, four hundred acres of land lying on Potomac, "beginning on the river side and from thence running to his back line, making a long square so as to have the same breadth on the river as on the back line."

The marriage soon afterwards took effect, and she was put into possession of the land by the following bounds, that is to say: "Beginning at the mouth of Goings gut, on the river Potomac, and extending down the river so

as to include four hundred acres of land between the river and the back line."

The back line called for in the patent was a due north course; that by which Robert Alexander then held was north 6 west. Claims have been since successfully asserted which would vary the back line so as to run north 17 west. The Appellants insist that those who hold under Parthenia shall be compelled to extend to the back line, as now established, and proportionably to contract their line down the river, so that the parallelogram shall still comprize four hundred acres. Pendleton, who is a purchaser under Parthenia, insists on being limited on the west by the line north 6 west, which was the back line when the title of Parthenia accrued.

In the year 1735, Robert Alexander departed this life, having first made his last will in which he devised as follows: "Item, I give to my daughter Parthenia Massey four hundred acres in Prince William county, according to my bond. Item, I give to my daughter Sarah Alexander, four hundred acres joining Parthenia Massey, the same length on the back line and the same breadth on the river."

Parthenia survived her husband, Dade Massey, and intermarried with Townshend Dade. Sarah intermarried with Baldwin Dade, and was put into possession of the land devised to her.

John and Gerard Alexander were the only sons of Robert, and were the co-devisees of the bulk of his estate. In April, 1740, John instituted a suit against Gerard for partition; and to this suit Townshend Dade and Parthenia, his wife, and Baldwin Dade and Sarah, his wife, were parties Defendants. A decree of partition was made, directing that the lands of the Dades also should be allotted to them to be held in severalty. Commissioners were appointed to execute this decree, with directions to report their proceedings to the Court.

Under this interlocutory decree the land was surveyed by Joseph Berry, and a division made. Four hundred acres were allotted to Townshend Dade and Parthenia, his wife, and the same quantity to Baldwin Dade and

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Sarah, his wife. This allotment was made on the idea that north 6 west was the true back line. But as the Alexanders intended to institute suits for the purpose of recovering lands lying west of the north 6 line, it was agreed between all the parties that the partition then made should not be conclusive, but should depend on the suits about to be instituted. In consequence, as is presumed, of this verbal agreement, the survey and proceedings under this interlocutory decree were not returned; and in May, 1741, the suit was dismissed agreed.

Townshend Dade and Parthenia, his wife, remained in quiet possession of the four hundred acres devised to Parthenia by her father, according to those boundaries which had been marked out on the idea that north 6 west was the true back line.

Sarah Dade died without issue; on which event her land was limited to her two brothers John and Gerard, who entered thereon and continued to hold it according to Berry's survey.

John Carlyle claimed the land west of north 6 west; and, in April 1766, commenced an ejectment against Alexander, who appears to have recovered part of the land between north 6 and north 17 west in a previous ejectment against one of his tenants. In May, 1771, a verdict and judgement were rendered in his favor.

In the year 1774, Townshend Dade and Parthenia, his wife, instituted a suit against John Alexander for a title to the land mentioned in the bond of Robert Alexander. To this suit John Alexander filed his answer stating the death of Dade Massey leaving a son by Parthenia, her subsequent marriage with Townshend Dade, and the doubt who was entitled to the land, as the reasons for its not having been previously conveyed.

In the same year, Charles Alexander, son and heir of John, filed his answer in which he states the doubt respecting the back line, admits the north 6 west to be the present back line, and prays that, should a more western boundary be at any time established, he and his heirs might be at liberty to vary the boundaries of Parthenia's land so as to conform to such future back line.

In 1776, a deed was executed by Charles Alexander to Parthenia Dade conveying 400 acres of land according to the bond of Robert Alexander. This deed specifies no boundaries and contains no stipulation respecting the future change of the back line. It would confirm the will of Robert Alexander, if that will wanted confirmation. In the year 1779, this suit was dismissed neither party appearing.

In May, 1778, Parthenia Dade conveyed this tract of land with no other description of the metes and bounds than was expressed in the bond and will of her father, to William Hartshorne, who took possession of the land and held it according to Berry's survey, which makes north 6 west the back line.

William Hartshorne laid off the northern part of the tract from the river to north 6 west in twenty-three lots which he sold to various persons; and then, in May, 1779, conveyed the residue of the land, which includes that in controversy, to William Harman, of Pennsylvania, by metes and bounds taking north 6 west to be the true back line.

In the year 1786, Mordecai Lewis, executor of William Harman, conveyed this land to Elisha Cullen Dick, who in 1796, conveyed eighty-three acres, the land now in dispute, to Henry Lee, who, in June, 1797, conveyed to Baldwin Dade, who, on the 29th day of December, in the year 1801, conveyed to Philip Fitzhugh, who, on the 18th of February, 1802, conveyed to Nathaniel Pendleton. In the same deed Fitzhugh conveys also to Pendleton three acres of land, other part of the tract of 400 acres, with notice that Charles Alexander claims north 17 west as the back line.

Previous to the conveyance from Baldwin Dade to Philip Fitzhugh, the said Dade had conveyed the land in controversy to Thomas Swan to secure a debt due to William Hodgson. Swan conveyed to William B. Page, in trust for Hodgson, who conveyed to Hodgson, who, in July, 1803, conveyed to Pendleton.

Soon after the decision in favor of Carlyle in May, 771, Charles Alexander brought an ejectment for the

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same lands, and in 1790, a verdict was given in his favor, on which a judgment was rendered, which was affirmed on appeal in 1792. In 1796, Charles Alexander instituted a suit in the Court of Chancery in Virginia, for the purpose of altering the boundaries by which the land of Parthenia had theretofore been held, and of laying off that tract so as to extend it to north 17 west, thereby narrowing its breadth where it stretches towards the town of Alexandria, and giving it more length. To this suit, those under whom Pendleton claims, with others were made Defendants.

Charles Alexander, departed this life in the year 1806, and the suit has not been revived.

Nathaniel Pendleton being about to sell the land in controversy, tendered to Charles Alexander a deed for quieting the title; and, on his refusing to execute it, instituted a suit to compel him so to do. After the death of Charles Alexander this suit was brought against the Defendant, his widow and children.

In the Circuit Court a decree was rendered in favor of the Plaintiff, from which the Defendants have appealed to this Court.

The cause was argued last term, by SWAN and JONES, for the Appellants, and by E. I. LEE and C. LEE, for the Appellee.

SWANN, *for the Appellants*.

The only question is, whether the long possession according to metes and bounds, gives a good title notwithstanding the claim of Alexander to carry his back line so as to run north 17 degrees west; instead of north 6 degrees west.

The bond to convey to Parthenia in 1731—2, calls simply for the *back line*; R. Alexander's will in 1735, devises the land to her by the same description; and the deed of confirmation from Charles Alexander in 1776, still refers to the *back line*. Whatever should be the back line of Alexander's tract, was to be the western boundary of Parthenia's 400 acres. In 1740 a suit was

instituted for partition, in which Parthenia was a party. A survey and partition was made, but was not acted upon by the Court, because the parties all understood that the back line was unsettled, and the partition then made was agreed to be temporary, and to be reformed if the back line should be carried farther to the westward than north 6 degrees west. This agreement, although verbal, was binding on Parthenia, at least so far as to prevent her possession from being considered as adversary to Alexander as to that part of the land which might be taken away upon settling the back line.

There was therefore no adverse possession until 1778, when Parthenia sold to Hartshorne. From 1778 to 1796, when C. Alexander instituted his suit in the Court of Chancery in Virginia, to alter the boundaries of the tract, there had not been 20 years of adverse possession. If Pendleton had looked back to his title he would have found that it was never conveyed by metes and bounds, prior to 1778, and that the question of boundary was still unsettled. He purchased while that suit was pending, and therefore must be presumed to have had notice of the claim.

E. I. Lee and C. Lee, *contra.*

This case is not affected by the question, which was the true back line of Alexander's land. Neither Parthenia nor those claiming under her, were parties to any suit in which that question was litigated, and cannot therefore be bound by any decision on that point. At the date of the bond, and of Robert Alexander's devise to Parthenia, he held only to the line north 6 west. The conveyance is to be taken most strongly against the grantor. In 1776, when C. Alexander made the deed to Parthenia, he held only to the same line, and it had been at that time established as his back line by a judgment in the year 1771.

If there were sufficient evidence of a parol agreement, it could be only an agreement to re-convey the land, if the back line should be settled further to the westward. Being a parol agreement to convey land, it would have been void by the statute of frauds.

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If Pendleton had notice of the pendency of C. Alexander's suit in chancery to alter the boundaries, yet that suit was afterwards discontinued, and there is no evidence that Hartshorne, or those claiming under him, had notice of the claim until after they had made their purchases. Pendleton holds their rights, and can protect himself by their want of notice.

JONES, *in reply.*

There was nothing in the title to deceive purchasers. There was sufficient evidence on the face of the deed to show that the possession was temporary. They all refer to the back line of Howsen's patent; and every purchaser would necessarily enquire where that line was. Upon the enquiry he would find either that the line was in dispute and unsettled, or that it had been settled at north 17 degrees west.

The agreement was merely evidence of the nature of the possession, and was no more affected, in this respect, by the statute of frauds, than would be a simple declaration of the tenant, that he held not adversely to, but under, R. Alexander.

If the title is to be quieted, it must be upon the principle that long possession by certain metes and bounds, induces a presumption that some deed had been made conformable to the possession. But such a presumption is rebutted by the agreement.

March 12th.

MARSHALL, *Ch. J.* after stating the case, delivered the opinion of the Court as follows:

"This being an application to restrain a person from the assertion of title in the ordinary course of judicial proceedings, the prayer of the bill ought not to be granted in a doubtful case; but if the case be a clear one, the interposition of equity is allowable; and the situation of the land adjoining a growing city, the number of persons who are consequently interested in the settlement of the question, and the numerous titles which de-

pend on it, give it peculiar claims to the attention of the Court.

By the laws which govern this case, a possession of thirty years under some circumstances, and of fifty years, under any, constitutes a title against all the world. The Appellee claiming under a possession perhaps from the year 1732, certainly from the year 1741, has a complete title, unless something can be alleged by the Plaintiffs in error which shall deprive him of the advantages of that possession.

It is urged that the contract of 1741, between the Alexander's and the Dade's, made the latter trustees for the former with respect to that portion of the land included in Berry's survey, which they had agreed to surrender in the event of establishing a more western back line. And that, therefore, in computing time, we must commence with the sale from Parthenia Dade to William Hartshorne, in May, 1778.

Had the land continued in possession of Parthenia Dade and her heirs, the question whether this contract was of unlimited duration, or contemplated some particular suit then intended to be brought, would merit consideration. But as the contract does not appear on the title papers, but was verbal, a purchaser for a valuable consideration could not be affected by it unless he was a purchaser with notice. Finding Parthenia Dade in the quiet and undisturbed possession of four hundred acres of land, forming a parallellogram, limited on the west by the line north 6 west, he had a right to consider that line as established, so far as respected the land of Parthenia. He was not bound to know that a private parol agreement existed, which would control the possession. This trust therefore no more passed with the land to Hartshorne, than would any other secret trust of which he had no knowledge.

The various suits which have been instituted by, and against the ancestors of the Appellants cannot affect this cause. A suit not prosecuted to a decree or judgment is not constructive notice to a person not a pendente lite purchaser; and were the law otherwise, those suits, until that instituted in 1796, would convey no notice of the

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private agreement made in 1741. A knowledge of the suits therefore would not imply a knowledge of the trust; and possession for fifty years, though with knowledge of a better title, if adversary, constitutes a good defence against that title.

In 1796, Charles Alexander instituted a suit against sundry persons claiming the land in controversy for the purpose of altering the boundaries which had been held by Parthenia, and those claiming under her, from the year 1732, and which had been surveyed under an interlocutory decree made by the Court of Chancery, in the year 1741. In defending themselves against this claim, the purchasers of the land had a right to unite the possession of Parthenia Dade to their possession, without being affected by a secret trust of which they had no notice. If upon the trial of that suit a possession of fifty years could not have been established, and if the Court should have been of opinion that this was not a case in which an adversary possession of thirty years would have constituted a bar, the merits of the title would have been necessarily investigated. But if Charles Alexander had permitted that suit to be dismissed, and had filed a new bill, he would not have been at liberty, in the computation of time, to avail himself of the pendency of the former suit, unless he could have connected the two suits together. The law is the same where a suit terminates by abatement and is not revived, such a suit takes no time out of the act of limitations. The title of Pendleton therefore has from that act all the benefit which can be derived from a possession from the year 1741, when a possession ostensibly adversary by metes and bounds unquestionably commenced, to the institution of this suit in the year 1806. The deduction which the laws of Virginia make from all computations of time in consequence of the war of the revolution, will not be sufficient to take this case out of the act of limitations. The Appellees title, being secured by a possession of more than fifty years, is unquestionably good, and it is proper that the doubts which hang over it, should be removed. There is no error in the proceedings of the Circuit Court and the decree is affirmed.

THIS case appears to be fully stated by the chief jus'ice in delivering the opinion of the Court.

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

This is an appeal from a decree of the Circuit Court for the district of Columbia, whereby a bill brought by the Plaintiffs for the specific performance of a contract, was dismissed. The material facts are these:

Daniel Carroll, the Defendant, was, previous to the establishment of the city of Washington, proprietor of a large tract of land, part of which lies within its present limits. This part was conveyed to trustees, one moiety for the use of the public, and the other moiety for the use of the said Carroll.

After the place for the seat of government had been selected, and the boundaries of the city marked out, the legislature of Maryland authorized the appointment of commissioners to superintend the affairs thereof, and among other powers authorized them to divide the lots in the said city between the public and the original proprietors, and declared that such divisions made in a specified form and certified by them should re vest in the original proprietors the legal estate whereof they were formerly seized in the lots and squares assigned to them respectively. The commissioners were also authorized to sell the lots retained for the public use, and on receiving the purchase money, to convey to the purchasers. On the 23d of September, 1793, James Greenleaf purchased from the commissioners three thousand lots lying in that part of the city which had been conveyed by Carroll; and on the 24th of December, 1793, James Greenleaf and Robert Morris made from the commissioners an additional purchase of three thousand lots. Neither the purchase money being then paid, nor a division made, the legal title remained in the trustees, and was a security for the purchase money. These contracts, if executed by conveyances, would

After a lapse of seven years, the Court will refuse to decree a specific performance of a contract, in the part execution of which the Complainants, or those under whom they claim, have expended large sums of money, although the first default was on the part of the Defendant, & although it be probable that the failure of the Defendant in that respect has prevented the completion of the execution of the contract on the part of the Complainants; circumstances having so changed that neither party could derive, from the execution of the contract, all the benefits which were at first expected.

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have vested in Greenleaf and Morris all the public lots which were intermingled with those hereinafter stated to have been purchased by Greenleaf from Carroll.

On the 26th day of September, in the year 1793, the said Daniel Carroll and James Greenleaf entered into articles, whereby Daniel Carroll covenanted in consideration of 5*l.* and of the covenants thereinafter mentioned, to convey to the said Greenleaf twenty lots of ground in the city of Washington, fronting on South Capitol street, in all convenient speed after the lots in that part of the said street should be divided between the said Carroll and the commissioners of the public buildings. The said conveyances to be on condition to be void in case the said Greenleaf should not, within three years from this date, erect a good brick house on each lot at least 25 feet front, 40 feet deep and two stories high. And the said Carroll further covenanted, that after the division, to be made of the land lying between the fork of the canal, between him and the commissioners should be completed, he would sell to the said Greenleaf every other lot belonging, after such division, to the said Carroll, for the consideration afterwards mentioned in the said articles; and would lay out the whole amount of the purchase money, when received, in building houses as near as well might be to those erected and erecting by the said Greenleaf; and in case of selling any of his property, he would cause buildings, to the amount of the purchase money, to be erected thereon. The said Greenleaf agreed to erect, on each of the *first mentioned twenty* lots, one good brick house, at least 25 feet front, 40 feet deep, and two stories high, within three years from the date, and to *re-convey* any of the said 20 lots not built upon within the time, and pay 100*l.* for each of the said lots not so built upon; to pay 30*l.* for each of the other lots to be purchased; to lay out on the last mentioned lots the sum of 3,000*l.* within two years, and the further sum of 3,000*l.* within four years; to pay one half of the amount of the purchase money with interest within two years, and the remainder with interest, within four years. Carroll to make deeds for the last mentioned lots purchased as the money should be paid. The parties bind themselves each to the other in the penal sum of 20,000*l.*

On the 8th June, 1795, it was agreed between the same parties to change the contract so far as that the said Greenleaf should build twenty brick houses of such description as he should judge proper, provided they are two stories high, and cover an equal extent of ground with the houses before mentioned, and of which the one moiety or ten houses shall be built on the south part of square numbered 651, and the residue on the east side of said square.

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In July, 1794, a partial division was made between Carroll and Greenleaf, by which the square No. 651 was allotted to the latter. It was on this square that the twenty houses mentioned in the contracts between the parties were intended to be built.

On the 13th of May, 1796, James Greenleaf, in pursuance of articles made July 10th, 1795, assigned his contract with Carroll to Morris and Nicholson, to whom he also transferred his interest in a large portion of the lots purchased from the commissioners. In the summer of 1796 Morris and Nicholson came to the city of Washington, when a division of the lots was completed, which was reported to the commissioners on the 14th of September, by whom it was then ratified. Twenty brick houses were erected on the square 651, and covered in by the 26th September, 1796, the time specified in the contract. Some of them were completed. In May, 1797, Daniel Carroll entered into the square 651, and took possession of the buildings thereon, which he has held ever since, and has permitted them to be greatly injured.

Morris and Nicholson conveyed their property in the city, to the Plaintiffs, in trust for certain creditors, by deed bearing date the 26th day of June, 1797, and became bankrupts. This bill was filed in December, 1804, claiming a specific performance of the whole contract of September, 1793, or, if the Court should be of opinion that the contract ought to be divided, the Plaintiffs pray for a specific performance of that part of it which respects the twenty lots, on which they say houses have been erected in conformity with their agreement. They contend that the non-execution on their part of so much of the contract of September, 1793, as remains to be

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performed is not to be ascribed to any fault of theirs, but to the failure of Carroll to convey the lots he had stipulated to convey.

On the part of the Defendant it is contended that he could not convey until a division should be made and sanctioned by the commissioners, and that it was as much the duty of Greenleaf as of himself to attend to the division. That his great motive for entering into the contract was, by improving that part of the city in which his property lay to increase its value and to give the town that direction. That this, from the failure of the other contracting party to perform his covenants, has become impossible: that the consideration on which he was to convey, cannot now be received; and that it would, therefore, be iniquitous to compel a conveyance.

This Court is clearly of opinion that by the contract of September, 1793, Daniel Carroll was bound to convey to Greenleaf the property therein mentioned without waiting for the execution of the contract on the part of Greenleaf. Being so bound, he ought to have taken those steps which were within his power, and which were necessary to be taken in order to enable him to perform his engagements. He ought, therefore, to have obtained from the commissioners that act which would re-vest in himself the property to be conveyed.

It is true that Greenleaf, having purchased the public lots, must have concurred in the division, and, had he declined coming to one, his default would have excused Carroll. But it is not pretended that he ever declined a division. It is true that his omitting to press one is a proof that, for some time at least, he was not anxious on the subject; and this diminishes the blame which might otherwise attach to Carroll for his inattention to so material a circumstance.

But in July, 1794, a division between Carroll and Greenleaf of several squares was made, and the square on which the twenty houses were to be erected was, among others, assigned to Greenleaf. There is no excuse for the delay of Carroll in enabling himself to convey the lots assigned to Greenleaf in this division. He

alleges that, as the calculations of their contents were inaccurate, the confirmation of this division by the commissioners was necessarily deferred, until this matter should be adjusted. But the Court cannot admit the sufficiency of this apology. Any inaccuracy in the calculations would be adjusted by allowances in the divisions afterwards to be made of the remaining lots.

It appears that in February, 1796, Robert Morris offered the first payment stipulated in the contract of September, 1793, with the interest which had accrued thereon, and *demanded deeds for the twenty lots.* In this letter Morris consents that these deeds should be executed as an escrow, to be delivered on their fulfilling that part of the contract by building twenty houses on the said lots, and proposes that separate deeds should be executed, that so many might be delivered as Morris and Nicholson should entitle themselves to. He also demanded a conveyance of so many lots, as the money offered would pay for, and required that Carroll should perform that part of his contract which required him to lay out half the money received in improving adjacent lots. This is the substance of Morris's letter, dated 22d February, 1796, directed to Mr. Cranch, the agent of Morris, which appears by Carroll's letter, written on the 29th of the same month, to have been laid before him, although Mr. Cranch does not recollect the fact. The conveyances, however, were not made nor the money paid.

Although the covenant to convey is not a condition precedent on the performance of which the covenant to build depends, yet both from the words of the contract and the nature of the transaction, it was apparently the expectation of the parties that the conveyance would precede the building. Nor was the conveyance an immaterial circumstance. In any state of things it was an important part of the contract, and in the events which have actually occurred, it was so important as to render it probable that the failure of Carroll in this respect, has prevented the completion of the twenty buildings. Under this view of the case, had the bill demanding a specific performance, been brought immediately after the entry of Mr. Carroll in May, 1797, the claim of the Plaintiffs would certainly have been enti-

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tled to serious attention, and might perhaps have prevailed. It was not then too late, by executing the contract, to have effected its great object. But the state of things is now entirely altered. The effort to give the city that direction would now, according to every reasonable calculation, be unavailing. Time, therefore, in this contract was essential; and although, in consequence of the failure of Carroll to convey, the Court might have relieved against a forfeiture so long as an execution of the contract could place the parties essentially in the situation in which they would have stood had exact punctuality been observed; yet equity cannot relieve where it is impossible to place the parties in the same situation, and when real fault is imputable to the person praying the aid of the Court. So far then as Morris and Nicholson have failed to execute the contract of September, 1793, the Plaintiffs are too late to be entitled to the aid of this Court.

But it is contended that Morris and Nicholson have fully complied with that part of the contract which respected building twenty houses, and are therefore entitled to a conveyance of the twenty lots. The description of the houses to be built is so indefinite as to be satisfied, it is said, by running up the brick walls, and putting on the roofs.

The Court is not of that opinion. On fair construction the contract requires that the houses should be fit for the habitation of families. No particular degree or kind of finishing is prescribed; but a building cannot be fairly denominated "a good brick house" until it be rendered a comfortable dwelling, fit for the reception of a tenant. This was certainly contemplated by the parties, and a different construction would tolerate an unfair and fraudulent execution of the agreement.

But, although the twenty houses were not all completed, some of them were, and on examining the contract it appears that Greenleaf and his assigns were entitled to a lot for each house they should build. The contract, with respect to the twenty lots, was not entire: It was not necessary to perform the whole contract, or to forfeit the whole property—that which was, as well as that which was not improved. This will be clearly perceived on a reference to the contract itself.

Carroll covenants to convey twenty lots with condition to be void, if Greenleaf shall not within three years erect a good brick house of stipulated dimensions on each lot. Greenleaf agrees to erect the houses, and covenants to re-convey any lot not built upon within the time, and to pay 100*l.* for each lot not so built upon. This stipulation obviously severs the contract with respect to each lot. Only those not built upon were to be re-conveyed, and for each lot re-conveyed there was a forfeiture of 100*l.*

So far as the contract has been executed by Greenleaf or his assigns, he and they ought to be placed in the same situation as if it had been executed by Carroll also. Had it been executed by him, the title of Morris and Nicholson to as many lots as they had erected houses of the description agreed upon, would have been absolute. It could not have been defeated by their failure to perform the residue of the contract. Carroll ought not to enable himself to defeat it by having broken his contract.

The Plaintiffs then ought to have a conveyance of so many lots as shall be equal to the number of houses they have completed under the agreement of September, 1793, and as Carroll's entry in May, 1797, was so far tortious he ought to be accountable for the injury sustained by the property, and for rents and profits from that time. But as the same contract binds Greenleaf and his assigns to pay 100*l.* for each lot not improved, and as the Court does not consider this as a mere penalty, but as damages assessed by the parties themselves, the Plaintiffs will not be entitled to a conveyance of the lots which were improved without paying 100*l.* with interest from the 6th of May, 1797, the time when the contract was determined by the entry of Carroll, on each unimproved lot. It is at their election to obtain a specific performance on these terms, or to abandon their claim.

It is the opinion of this Court that the decree of the Circuit Court ought to be reversed and annulled, and the cause remanded with directions to take an account of rents and profits which have been or might have been received by the Defendant on the houses which have

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been completed by Morris and Nicholson on the twenty lots in the proceedings mentioned; and also to take an account of the money with interest thereon, which was demandable by the Defendant on each unimproved lot; and that an issue, to be tried either in Alexandria or Washington, be directed to ascertain what damages have been sustained by the houses built by Morris and Nicholson previous to the 6th of May, 1797, whether finished or unfinished, on those lots which shall be decreed to be conveyed to the Plaintiffs, since the entry then made by the Defendant; and that on receiving the balance, if any, which may remain due to the said Carroll after deducting the rents and profits before mentioned, and the damages aforesaid, he be directed to convey to the Plaintiffs a number of standard lots which shall be equal to the number of houses completed by the said Morris and Nicholson in pursuance of the contract of September, 1793; the said lots to be those on which the houses stand, which may have been completed, and if there be more than one house standing on the same standard lot, so that it may be necessary to convey lots not fully improved in order to make the quantity of ground equal to the superficial contents of the standard lots to be conveyed, then such standard lots are to be laid off by direction of the Circuit Court, in such manner as may be equitable and convenient; provided, that the ground improved or built upon by Morris and Nicholson under the said contract, and re-entered upon by the Defendant in May, 1797, be appropriated in the first instance as far as the same shall suffice or be necessary to make up the quantity of ground to be conveyed to the Plaintiffs, but so appropriated that no lot shall be divided, unless it be necessary to convey part of a lot in order to make up the full quantity of six standard lots.

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13. If two partners own jointly a commercial house in New York, and one of them obtain an American register for a ship, by swearing that he, together with his partner, of the city of New York, merchant, are the only owners of the vessel, when in fact his partner was domiciled in England, the vessel is liable to forfeiture under the act of congress of *December* 31*st*, 1792, *Laws U. S. vol.* 2, *p.* 133. *The Venus*, 254

14. Goods purchased by British merchants, before the war between the United States and Great Britain, in pursuance of orders from American citizens, and shipped to the agent of the British merchants in the United States (who was also an American citizen) "on account and risk of an American "citizen," (no circumstances of fraud or unfairness appearing in the transaction) were vested in the American citizens at the time of shipment, and were not liable to condemnation, although the vessel sailed from England after the declaration of war was known there.

But if goods be purchased as above, although the accompanying invoices, bills of lading and letters be addressed to the American citizens for whom the purchases were made, and all concur to show the property to be in them, yet if these documents be enclosed in a letter from the shippers to their agent in the United States, directing him not to deliver the goods in a certain event, nor until he should have received payment in cash, the property in the goods continued in the shipper at the time of capture, and they were liable to condemnation.

Goods, by the same ship, purchased as above, and consigned to the agent of the consignors, (being an American citizen) in whose name the bill of lading is made out, but the bills of parcels and invoice in the name of the American merchants for whom the purchases were made; the shipment also being expressed to be on their account, although the goods are spoken of in the letter of the consignors as British property; vested in the American merchants at the time of shipment; and were not liable to condemnation. The circumstance that the goods continued, during the whole voyage, at the risk of the shippers is immaterial. *The Merrimack*, 317

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papers to be a consignment from alien enemies to American merchants, were condemned *in toto*, although further proof was offered that American merchants were jointly interested, and that they had a lien upon the goods in consequence of advances made by them. Further proof on those points refused. *The Frances. Thompson's claim*, 336

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19 An intention of a consignor of goods to vest the right of property in the consignee, is not sufficient to effect such a change of property until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account; until that time, the goods are at the risk of the shippers; and if *they* are enemies, the goods, if captured, are good prize. The result is the same, although the consignee be the agent of a third person who had directed him to order the goods, unless it appear that he did actually order them. *The Frances. French's claim*, 359

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24 A forfeiture under the 3d section of the *act of 28th June*, 1809, ch. 9. will over-reach a *bona fide* sale to a purchaser for valuable consideration without notice of the offence. *United States v. Brig Mars*, 417

25. No lien upon enemy's property, by way of pledge for the payment of purchase money, or otherwise, is sufficient to defeat the rights of the captors, in a prize Court, unless in very peculiar cases where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. *The Frances. Irvin's claim*, 418

26. Where goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor at any time before actual delivery to the consignee, to countermand it, and thus to prevent the consignee's

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2. Where the general owner of a ship retains the possession, command and navigation of the same, and contracts to carry a cargo on freight for the voyage, the charter party is to be considered as a mere affreightment sounding in *Covenant*, and the freighter is not clothed with the character or legal responsibility of ownership. In such case the general owner is also owner for the voyage; and if he be the master of the vessel he is incapable of committing barratry. *Marcadier v. Ches. In. Co.* 40

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See *Columbia*, 2, 3, 98

MEMORANDUM ARTICLES.

See *Insurance*, 1, 39

MONEY HAD AND RECEIVED.

See *Columbia*, 2, 98

MORTGAGE.

See *Columbia*, 1, 36

N.

NATURALIZATION.

See *Admiralty*, 15, 335

NON-IMPORTATION.

See *Admiralty*, 10, 221

NON-INTERCOURSE ACT.

1. *Quere*, whether the non-intercourse act, as it regards Great Britain, was not merged in the law of war. *The Rapid*, 164
2. The forfeiture of goods for the violation of the non-intercourse act of March 1st, 1809, takes place upon the commission of the offence and avoids a subsequent sale to an innocent purchaser, although there may have been a regular permit for landing the goods, and although the duties may have been paid. *United States v.* 1960 *bags of coffee*, 398
3. Same point as to the act of 28*th June*, 1809, *ch.* 9, § 3. *The brig Mars*, 417

NON-TENURE.

See *Abatement*, 2, 3, 4, 5, 6, 229

NOTICE.

1. A purchaser *with* notice is protected by his vendor's *want* of notice. *Alexander v Pendleton*, 462
2. See *Limitations*, 8, 9, 462

O.

ORDERS IN COUNCIL.

See *Admiralty*, 29, 421

ORDINARY.

See *Administrator*, 9

ORPHAN'S COURT.

See *Appeal*, 1, 251

P.

PARTNERSHIP

1. See *Joint merchants*, 1, 2, 30
2. See *Limitations*, 3, 72

PATENT.

1. See *Conveyance*, 1, 232
2. See *Assignment*, 371

PERMIT.

See *Admiralty*, 1, 169

PLEADING.

1. See *Joint merchants*, 1, 2, 30
2. See *Abatement*, 229

POLICY.

See *Insurance*, 3, 4, 5, 55, 59

POSSESSION.

1. See *Writ of right*, 9, 10, 11, 15, 16, 17, 229
2. See *Limitations*, 7, 8, 9, 462

PRACTICE.

See *Writ of right*, 229

PRESIDENT.

See *Admiralty*, 27, 28. 421

PRIORITY.

See *Insolvent*, 2, 431

PRIVATEERS.

See *Admiralty*, 21, 27, 28.

PRIZE.

See *Admiralty* 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and the case of the *Mary*, 388

PROBATE.

1. See *Administration*, 9
2. See *Executor*, 2, 3; 9
3. See *Appeal*, 1, 251

PROMISSORY NOTE.

See *Joint merchants*, 1, 2, 30

PURCHASER.

1. See *Alexandria*, 53
2. A purchaser *with* notice is protected by his vendor's *want* of notice. *Alexander v Pendleton*, 462
3. A purchaser without notice has a right to join his adversary possession to the ostensible adversary possession of his vendor, so as to give himself the benefit of the statute of limitations. *Alexander v. Pendleton*, 462

R.

RANSOM.

See *Insurance*, 6,

REGISTER.

See *Admiralty*, 13, 253

RELATION.

See *Admiralty*, 23, 24.

REVENUE

See *Admiralty*, 1, 23, 24.

RIGHT, WRIT OF

See *Writ of right*.

RUBLE.

See *Insurance*, 3, 55

S.

SALVAGE.

See *Admiralty*, 10, 221

SCIRE FACIAS.

By the law of South Carolina the 30 day rule is substituted for a *scire facias* on a judgment in those cases only where lapse of time prevents the Plaintiff from suing out execution. *Griffith v. Frazier*, 10

SEIZIN.

See *Writ of right*, 9, 10, 11, 15, 16, 17, 229

SHIP, AMERICAN.

See *Admiralty*, 13, 254

SHIPPER.

See *Admiralty*, 12. 253

SOUTH CAROLINA.

See *Scire facias*, 9

SPECIFIC PERFORMANCE.

After a lapse of 7 years the Court will refuse to decree a specific performance of a contract, in the part execution of which the Complainants, or those under whom they claim, have expended large sums of money, although the first default was on the part of the Defendant, and although it be probable that the failure of the Defendant, in that respect, has prevented the completion of the execution of the contract on the part of the Complainants; circumstances having so changed that neither party could derive, from the execution of the contract, *all* the benefits which were at first *expected*. *Pratt v. Carroll*, 471

STATUTE OF USES.

See *Conveyance*, 3, 234

STOPPAGE IN TRANSITU.

See *Admiralty*, 14, 25, 26.

SUPPRESSION OF PAPERS.

See *Admiralty*, 33, 434

SURPLUS LAND.

See *Assignment*, 371

SURVEY.

See *Assignment*, 371

SUSPICION.

See *Collector*, 94

T.

TAXES.

See *Alexandria*, 53

TENURE, JOINT

See *Writ of right*, 2, 4, 5, 14, 229

TENURE, SOLE

See *Writ of right*, 3, 4, 5, 14, 229

TITLE.

See *Limitations*, 7, 8, 9. 462

TRADING WITH THE ENEMY.

See *Admiralty*, 4, 5, 7, 8, 9, 11, 12, 14, 15, 16, 18, 19, 20, 21, 25, 26, 29, 30, 32, 34, 35, 36.

TRUSTEE.

See *Columbia*, 1, 36

U.

UNITED STATES

1. See *Admiralty*, 21, 382
2. See *Insolvent*, 2, 431

USAGE OF TRADE.

See *Insurance*, 5, 75

USES, STATUTE OF

See *Conveyance*, 3, 234

V.

VACANT LANDS.

1. See *Columbia*, 3, 99
2. See *Conveyance*, 1, 2, 3, 229

VENDEE.

1. See *Admiralty*, 23, 24.
2. See *Alexandria*, 53

3. See *Purchaser*, 2, 3, 462
4. See *Assignment*, 371

VIRGINIA.

1. See *Assignment*, 371
2. See *Lands*, 1, 66
3. See *Writ of right*, 229

W.

WAR.

See *Admiralty*, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38.

WASHINGTON CITY.

See *Columbia*, 2, 3, 98

WILD LANDS.

See *Conveyance*, 1, 2, 3, 229

WILL.

1. See *Lands*, 1, 66
2. See *Appeal*, 1, 251

WRIT OF RIGHT.

1. The Circuit Courts of the United States have jurisdiction in writs of right, where the property demanded exceeds 500 dollars in value; and if, upon the trial, the demandant recover less, he is not to be allowed his costs; but, at the discretion of the Court, may be adjudged to pay costs. *Green v. Liter*, 229
2. At common law a writ of right will not lie except against the tenant of the freehold demanded. *Green v Liter*, 230
3. If there are several tenants, claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead in abatement. *Green v. Liter*, 230
4. If the Demandant demand against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden; but the writ shall abate only as to the parcel whereof non-tenure is pleaded and admitted or proved. *Green v. Liter*, 230
5. Under the act of Kentucky to amend process in chancery and common law, the party may recover, although he prove only part of the claim in his declaration; but it does not enable him to join parties in an action, who could not be joined at the common law. *Green v. Liter*, 230
6. The act of Virginia of 1786, reforming the method of proceeding in writs of right, did not vary the rights or legal predicament of the parties, as they existed at the common law. It did not, therefore, change the nature and effect of the pleadings; and, notwithstanding that act, the tenant shall have the full benefit of the ordinary pleas in abatement. The clause in the act which provides that the tenant, at the trial, may, on the general issue, give in evidence any matter which might have been specially pleaded, is confined to matters in bar. *Green v. Liter*, 231
7. Under the act of Virginia of 1786 the tenant may, at his election, plead any special matter in bar, in a writ of right, or give it in evidence on the *mise* joined. *Green v. Liter*, 231
8. The act of Virginia of 1786 did not change the nature of the enquiry as to the titles of the parties to a writ of right. *Green v. Liter*, 232
9. In order to support a writ of right, it is not necessary to prove an actual entry under title, or actual taking of *esplees*. A *constructive* seizin *in deed* is sufficient. *Green v. Liter*, 232
10. Under the land law of Virginia, the whole legal estate and seizin of the commonwealth pass to the

patentee, upon the issuing of his patent. *Green v. Liter*, 232
11. A conveyance of wild or vacant lands, gives a *constructive* seizin thereof *in deed* to the grantee, and attaches to him all the legal remedies incident to the estate; *a fortiori*, this principle applies to a patent. *Green v Liter*, 232
12. In Kentucky the patent is the completion of the legal title; and it is the legal title only that can come in controversy in a writ of right. *Green v. Liter*, 233
13. A better subsisting title in a third person is no defence in a writ of right. *Green v. Liter*, 233
14. If tenants claiming different parcels of land by distinct titles, omit to plead that matter in abatement, and join the *mise*, it is an admission that they are joint-tenants of the whole; and the verdict, if for the demandant for any parcel of the land, may be general that he hath more mere right to hold the same than the tenants; and if of any parcel for the tenants, that they have more mere right to hold the same than the demandant. *Green v. Liter*, 233
15. If a man enter into lands, having title, his seizin is not bound by his actual occupancy, but is held to be co-extensive with his title. But if a man enter without title, his seizin is confined to his possession by metes and bounds. *Green v. Liter*, 234
16 An entry into a parcel which is vacant will not give seizin of a parcel which is in an adverse seizin; but an entry into the last parcel in the name of the whole, will enure as an entry into the vacant parcel. *Green v. Liter*, 234
17. By a conveyance taking effect under the statute of uses, the bargainee has a complete seizin *in deed*, without actual entry or livery of seizin. *Green v. Liter*. 234

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